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# Choice of Forum Clauses in International and Interstate Contracts

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# Choice of Forum Clauses in International and Interstate Contracts

BY JAMES T. GILBERT\*

*Party autonomy has long been recognized in contractual choice of law provisions, but not in contractual forum selection provisions. Mr. Gilbert analyzes judicial treatment of the attempts by private contracting parties to limit dispute resolution to a particular forum in the interstate and international context and identifies a trend to effectuate the parties' choice under certain circumstances. The author further discusses the relationship of choice of forum and choice of law, both by considering the effect this relationship has, or should have, on the determination whether to allow the choice of forum provision to be effective, and by pointing out potential problems of constitutional dimension in the relationship. Mr. Gilbert calls for a more thorough judicial analysis of the choice of law implications of forum selecting provisions through a policy centered approach.*

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## I. INTRODUCTION

In the context of international and interstate contracts,<sup>1</sup> choice of forum clauses may be extremely useful devices, and consequently, their occurrence is relatively common.<sup>2</sup> Such a clause provides that the litigation of any dispute arising out of the contract shall be initiated exclusively in the courts of State X and that such stipulation is to be distinguished from a simple consent to jurisdiction. In the view of the parties to the contract, the usefulness, and therefore the desirability, of a choice of forum provision is obvious: there are numerous inherent uncertainties for all involved when dealing and contracting across international, or even state, boundaries, and any device which tends to render multinational or multistate transactions less uncertain is sure to reduce the complexity, if not the incidence, of disputes and result in a greater feeling of security on behalf of the parties and more stability in the entire transaction.<sup>3</sup>

A choice of forum clause may provide more certainty in several respects. First, it can obviate a jurisdictional struggle between the courts of nations or states which in fact have personal jurisdiction by selecting a single forum to hear and determine all disputes under a given contract. Parties will be well

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<sup>1</sup> For the purpose of this paper, the term "international contract" or "interstate contract" will be given a broad meaning; *viz.*, any legally enforceable private agreement with multinational or multistate aspects, including those with (a) parties of diverse nationality or state citizenship, (b) extranational or extrastate subject matter, (c) extranational or extrastate execution, or (d) extranational or extrastate performance.

<sup>2</sup> Nadelman, *The Hague Conference on Private International Law and the Validity of Forum Selecting Clauses*, 13 AM. J. COMP. L. 157 (1964).

<sup>3</sup> See Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 674 (1959): "[R]easonable certainty is of the utmost importance to the parties and needless uncertainty serves neither private nor state interests."

aware of where they will have to go should a disagreement arise and can thus plan in advance. Second, it is a flexible device which allows parties to tailor the dispute resolution mechanism to their particular situation. They may select a forum which is convenient for both sides; they may choose a forum because of its neutrality, or because of its expertise in the particular subject matter of the contract. Further, a choice of forum clause may act to "complement" a specific choice of law, thereby permitting the chosen court to interpret and apply its own law, presumably because it is better suited to do so than any other court.<sup>4</sup>

Since forum selection clauses are desirable from the standpoint of the parties to the international or interstate transaction because of the resulting added stability, they also tend to encourage trade by negating the fear of the vagaries of unfamiliar and fortuitous foreign courts.<sup>5</sup> This relative certainty is an extremely important element in the formulation of private international and interstate agreements. In fact, one commentator has gone so far as to declare that "advance determination of the forum is the best method of avoiding jurisdictional controversies in an age which has not yet developed a truly international jurisdiction."<sup>6</sup> It is little wonder then that choice of forum provisions are quite routinely found in multinational or multistate contracts.

A note on this article's concern with both international and interstate contracts is in order here. The conceptual analyses underlying decisions involving both types of contracts are remarkably similar, although, as will become evident later,

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<sup>4</sup> Reese, *A Proposed Uniform Choice of Forum Act*, 5 COLUM. J. TRANSNAT'L LAW 193, 196 (1966). See also Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law*, 8 INT'L. LAWYER 83, 85, 99-100 (1974); Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1620-21 (1966); Traynor, *supra* note 3, at 674.

<sup>5</sup> 1 A. EHRENZWEIG, *CONFLICT OF LAWS* 149, 151-52 (1962) [hereinafter cited as EHRENZWEIG]; Casenote, 11 COLUM. J. TRANSNAT'L LAW 449, 453 (1972).

<sup>6</sup> Lenhoff, *The Parties' Choice of a Forum: "Prorogation Agreements,"* 15 RUTGERS L. REV. 414 (1961) [hereinafter cited as Lenhoff.] The same, of course, can be said of interstate jurisdiction in the United States, although perhaps to a lesser extent. But it cannot be denied that concepts such as "transient jurisdiction" are instrumental in adding instability and uncertainty to multistate transactions. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

whether a transaction has an international aspect may be relevant to determine the "reasonableness" of the choice of court provision. Also, decisions of both state and federal courts are significant in this context and will be considered herein. Federal courts, of course, have original jurisdiction where a "federal question" is involved, as, for example, an action arising under a federal statute.<sup>7</sup> In some instances, the jurisdiction would be concurrent with state courts.<sup>8</sup> Of course, even if it is exclusively a state law issue such as a dispute arising under a sales contract, the defendant could normally remove the action to federal district court based on diversity of citizenship<sup>9</sup> in the usual international or interstate contract case. But in diversity the federal court under the *Erie* doctrine<sup>10</sup> would be obliged to

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<sup>7</sup> 28 U.S.C. § 1331 (1970). Generally, the amount in controversy must exceed \$10,000 in order for federal question jurisdiction to obtain. However, there are numerous statutory exceptions through which Congress has authorized district court jurisdiction to be exercised without regard to the amount in controversy, e.g., 28 U.S.C. § 1333 (admiralty and maritime actions); 28 U.S.C. § 1334 (bankruptcy matters and proceedings); 28 U.S.C. § 1336 (review of certain Interstate Commerce Commission orders); 28 U.S.C. § 1337 (actions arising under federal statutes regulating commerce or anti-trust matters); 28 U.S.C. § 1338 (actions involving patents, copyrights, and trademarks); 28 U.S.C. § 1339 (postal matters); 28 U.S.C. § 1340 (actions concerning federal revenue laws); 28 U.S.C. § 1344 (certain election dispute actions); 28 U.S.C. §§ 1345-49, 1358, and 1361 (actions in which the United States is a party); 28 U.S.C. § 1350 (certain alien's actions for torts); 28 U.S.C. § 1352 (actions on bonds executed under federal law); 28 U.S.C. § 1353 (actions concerning Indian allotments); and 28 U.S.C. § 1357 (actions for injuries under federal law). These exceptions have prompted the Supreme Court to note that the jurisdictional requirement of amount in controversy is mostly irrelevant in federal question cases, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 550, n. 18 (1972).

<sup>8</sup> But federal courts have exclusive jurisdiction in many instances, e.g., 28 U.S.C. § 1333 (1970) (except that under this section the "saving to suitors" clause limits exclusive federal court jurisdiction over admiralty and maritime matters to limitation of liability proceedings and in rem maritime actions). See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 24 (2d ed. 1970).

<sup>9</sup> 28 U.S.C. §§ 1332(a), 1441 (1970).

<sup>10</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held, in general, that federal courts sitting in diversity jurisdiction must apply the substantive law of the state where the court is located. The *Erie* doctrine was further refined by several subsequent cases, most notably *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), which held that in diversity cases, the federal district court must follow the conflict of laws rules of the state in which it sits; *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), holding that whether a state law must be applied under *Erie* depended upon whether it was "outcome-determinative"; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), which indicated that state law need not be applied in diversity actions if it would disrupt essential characteristics of the federal judicial system; and *Hanna v. Plumer*, 380 U.S. 460 (1965), holding that the Federal Rules of Civil Proce-

follow the choice of law rule of the state in which it is sitting.

Choice of forum clauses have two clearly defined effects; one affirmative, the other negative.<sup>11</sup> Affirmatively, it is a consent to the jurisdiction of a particular court with respect to the issues agreed upon.<sup>12</sup> In civil law terms, this is known as *prorogation*, and is of primary importance to the court which was selected by the parties to be the exclusive arbiter of any future disputes arising out of the agreement.<sup>13</sup> This affirmative operation is a bestowal or receipt of a particular jurisdiction by the parties; that is, a functional consent. On the other hand, the forum selection provision operates negatively in that it constitutes a denial of exercise of jurisdiction to any court which is not the chosen forum even though it may otherwise have a recognized basis for exercising jurisdiction.<sup>14</sup> This is the *derogation* effect in civil law terms, and is of primary importance to the court which could have had jurisdiction, in absence of the forum stipulation, but was one which the parties chose not to utilize.<sup>15</sup> The functional effect of this negative operation of the choice of forum provision is exclusion, as opposed to the function of the prorogation aspect, which is consent.<sup>16</sup>

The affirmative operation of a choice of forum clause as a

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dure are to be applied in diversity actions by federal district courts regardless of state law.

<sup>11</sup> See Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 INT'L. LAW. 530, 534 (1973).

<sup>12</sup> *Id.*

<sup>13</sup> Perillo, *Selected Forum Agreements in Western Europe*, 13 AM. J. COMP. L. 162 (1964).

<sup>14</sup> Reese, *supra* note 11, at 534.

<sup>15</sup> Perillo, *supra* note 13, at 162.

<sup>16</sup> [T]he terms "confer" and "oust" are inappropriate unless they be clearly understood as shorthand expressions for what really occurs. When parties agree to "confer" exclusive jurisdiction on the courts of State "A", they agree merely to surrender their legal privileges to bring an action in any other state, and at the same time, they have agreed to surrender their privileges to object to the jurisdiction of State "A". If the agreement is enforced, it cannot truly be said that jurisdiction has been conferred or ousted by the parties. Jurisdiction is exercised or withheld only by force of the law that gives effect to the parties' agreement. If this analysis is accepted, it is still permissible to speak of the "conferring" or "ousting" of jurisdiction by contract so long as we do not allow this terminology to mislead us into thinking that parties can undermine or augment the powers of states or courts when they bargain away merely their own legal privileges. Perillo, *supra* note 13, at 162.

prorogation agreement has rarely caused significant problems. It has been the generally accepted rule for some time that a court which is otherwise competent<sup>17</sup> may exercise personal jurisdiction bestowed upon it by the parties' consent before<sup>18</sup> or after<sup>19</sup> the cause of action accrues and render a valid and binding judgment thereon. That is, consent, even prior to the existence of the dispute or cause of action, may effectively enable a court properly to exercise in personam jurisdiction.<sup>20</sup> The chosen court must take care, however, not to exceed the scope of jurisdiction to which the party consented and strictly conform to the precise specifications of the consent; otherwise, the judgment is void.<sup>21</sup>

It is the negative operation of a choice of forum clause in derogation of the jurisdiction of a court that has led to the most difficulties. Professor Reese writes that the real question with regard to a choice of forum provision is whether a court will enforce the selection in its derogative effect; *i.e.*, whether the court "will refuse to entertain a suit brought in violation of the

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<sup>17</sup> That is, the court has the requisite subject matter jurisdiction to properly determine the particular cause of action. See R. LEFLAR, *AMERICAN CONFLICTS LAW* 48 (1968); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 32, Comment b (1971).

<sup>18</sup> *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id.* at 315-16. See also EHRENZWEIG at 148; H. GOODRICH & E. SCOLES, *CONFLICT OF LAWS* § 73 (1964); R. LEFLAR, *supra* note 17, at 26; R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 100-02 (1971); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 32 (1971); Reese, *supra* note 4, at 194.

<sup>19</sup> *Adam v. Saenger*, 303 U.S. 59 (1938); see also commentators cited in note 18, *supra*.

<sup>20</sup> As a jurisdictional concept, consent to the jurisdiction of a court by a party is much less objectionable than the "transient rule" of jurisdiction, *i.e.*, exercising in personam jurisdiction over anyone personally served with process while within the territory of the forum state, regardless of whether the person is permanently or merely temporarily there. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 28 (1971); R. WEINTRAUB, *supra* note 18, at 96-98. For case examples see *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant personally served while flying in airplane over the jurisdiction); *Peabody v. Hamilton*, 106 Mass. 217 (1870). For a strong criticism and denouncement of the transient jurisdiction rule, see Ehrenzweig, *supra* note 6.

<sup>21</sup> *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U.S. 287 (1890). See R. LEFLAR, *supra* note 17, at 48. Furthermore, consent in cognovit, or confession of judgment clauses are often looked upon with judicial disfavor. See, *e.g.*, *Atlas Credit Corp. v. Ezrine*, 25 N.Y.2d 219, 250 N.E.2d 474 (1969), holding that a judgment obtained on the basis of such a clause is not entitled to full faith and credit.

clause even though they have personal jurisdiction over the defendant."<sup>22</sup> That is, the problem is the exclusion rather than the consent. It is this "derogative" or negative effect with which this paper will be primarily concerned.

Some choice of forum terms seem, on their face, purely prorogatory. That is, the clause often simply names a court in which all disputes are to be brought for determination. The question then becomes whether the provision means that the parties intended to exclude all other courts—whether the choice is exclusive. In general, the court will attempt to interpret the agreement in accordance with the intent of the parties as in other contract interpretation situations and will draw inferences of the parties' intent from the surrounding circumstances.<sup>23</sup> So even though the forum selection appears purely prorogatory, it often still has a derogatory effect. Needless to say, when drafting a choice of forum provision one should always clearly indicate the parties' intent that the chosen forum is to be exclusive.

## II. EARLY COMMON LAW DEVELOPMENT

The early common law choice of forum doctrine provided that every contract was governed by the law of the place of contracting (*lex loci contractus*)<sup>24</sup> unless the parties to the contract specifically agreed otherwise.<sup>25</sup> The parties were permitted, then, to make an effective *choice of law* through an agreement in their contract; the intention of the parties was upheld

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<sup>22</sup> Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964) [hereinafter cited as *The Contractual Forum*].

<sup>23</sup> Lenhoff, *supra* note 6, at 417; RESTATEMENT (SECOND) OF CONTRACTS § 228(1) (Tent. Draft 1973).

<sup>24</sup> "[T]he law of the country where a contract is made." A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 16 (9th ed. 1973).

<sup>25</sup> *Wuebker v. James*, 58 N.Y.S.2d 671, 675, (1944). In *Robinson v. Bland*, 1 W.Bl. 234, 96 Eng. Rep. 129 (1760), where the plaintiff sued in England to enforce a gambling obligation which arose in France and was valid in France but not in England, Lord Mansfield stated:

[T]he general rule established *ex comitate et jure gentium* is, that the place where the contract is made and not where the action is brought is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties (at the time of making the contract) had a view to a different Kingdom.

1 W. Bl. 234, 259, 96 Eng. Rep. 129, 141 (1760) as cited in Comment, 12 S. TEX. L.J. 214, 215 (1970).



in this context.<sup>26</sup> The common law approach concerning *choice of forum*, however, was not so considerate of party intentions. The general rule was that parties to a contract could not, by agreement in the contract, "oust" or prevent a court from taking jurisdiction, and agreements purporting to do so were void.<sup>27</sup> The jurisprudential reasoning behind this rule was that the jurisdiction of courts was not subject to alteration by private agreement. Jurisdiction of courts was said to be subject only to public and not private control.<sup>28</sup> So at common law, the parties' intention embodied in a choice of court provision was ignored, at least in the derogatory sense.

Courts which followed the common law rule denying effect to choice of forum clauses and refusing to dismiss or stay an action brought in contravention of such an agreement generally articulated their decisions on any of three main bases: (1) Parties cannot by private agreement deny the jurisdiction or power of a court which is otherwise competent, (2) to permit parties to change the usual plaintiff-oriented forum selecting rules would be inconvenient and productive of inconsistency, and (3) forum selection clauses are against public policy.<sup>29</sup> Professor Reese has pointed out that these explanations actually explain nothing. The third basis is merely a conclusion without any rationale behind it; the second arguably concerns only jurisdictional rules and can easily produce rather than lessen consistency; the first is looking at the issue in the wrong terms. Courts should not look on the choice of forum as an "ouster," but use their discretion to dismiss, as on *forum non conveniens* grounds, when suit is brought in violation of such agreement.<sup>30</sup>

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<sup>26</sup> See also A. DICEY & J. MORRIS, *supra* note 24, at 725; Comment, 12 S. TEX. L.J. 214, 216 nn. 8 & 9 (1970). Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

<sup>27</sup> Cowen & Da Costa, *The Contractual Forum: Situation in England and the British Commonwealth*, 13 AM. J. COMP. L. 179, 181 (1964). See also 6A CORBIN, CONTRACTS § 1445 (1962); EHRENZWEIG at 148; Comment, 59 MINN. L. REV. 436-37 (1974). This concept, of course, only applied when the chosen forum was meant to be exclusive.

<sup>28</sup> See generally EHRENZWEIG at 148-49, n. 15 (1962). It is interesting to note that in 6A CORBIN, CONTRACTS § 1445 (1962), the section embodying this concept of "ouster" of jurisdiction is in a chapter entitled "Bargains Harmful to the Administration of Justice."

<sup>29</sup> *The Contractual Forum* *supra* note 22, at 188.

<sup>30</sup> *Id.* See also EHRENZWEIG at 149: "Neither history nor rationale thus bear out the much-repeated axiom that parties may not 'oust' the courts from their jurisdiction."

The reasons enunciated by the courts do not appear to be persuasive.<sup>31</sup> What, then, are the real reasons underlying the common law rule? Several plausible rationales have been identified. One such "real" explanation is that courts were often unwilling to force a local party to litigate in a foreign forum.<sup>32</sup> A second reason might be that judicial enmity to forum selection clauses stems from the courts' early disfavor of arbitration clauses, applied analogously to choice of forum provisions.<sup>33</sup> Another rationale that has been advanced is that the rule may have begun when judges were paid for the number of cases they heard and forum selection clauses were a threat to their livelihood.<sup>34</sup> Finally, and perhaps most realistically, the courts understood that choice of forum clauses often appear in adhesion—the so-called "take-it-or-leave-it"—contracts, and are the result of disproportionate bargaining power between the parties.<sup>35</sup> These reasons appear to go more to the overall validity of the forum selection clause rather than its particular application or effect in a particular case. The actual reason behind the decision undoubtedly varies from case to case, and in some instances is no doubt an amalgam of all the above explanations.<sup>36</sup>

It is important to note here that courts which followed the common law approach were probably aided by the conceptual viewpoint they took of the problem; *viz.*, they looked at the derogatory effect of a choice of forum clause as depriving a competent court of jurisdiction—usually referred to distastefully, as "ouster." Most recent commentators agree that this is a misconception of the problem. It has been said that the real issue is "whether, in a proper case, a court should refrain from exercising such jurisdiction as it admittedly possesses in order to give effect to the parties' intentions as expressed in a choice

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<sup>31</sup> See the analysis in EHRENZWEIG at 148-53.

<sup>32</sup> EHRENZWEIG at 150; *The Contractual Forum* at 188.

<sup>33</sup> Nadelman, *Choice of Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124, 127 (1973); *The Contractual Forum* at 188. But see EHRENZWEIG at 148, where he writes that "[T]here is little historical support for this assumption."

<sup>34</sup> *The Contractual Forum* at 189.

<sup>35</sup> *Id.* at 188; EHRENZWEIG at 150 (citing numerous authorities).

<sup>36</sup> Professor Ehrenzweig argued that derogative choice of forum agreements were not upheld in only two situations: to protect a local citizen against a foreign forum, and in adhesion contracts, EHRENZWEIG at 149, thus denying the other two explanations discussed in the text.

of forum clause."<sup>37</sup> Clearly, parties cannot deprive a competent court of jurisdiction simply by an agreement, and this is generally accepted.<sup>38</sup> However, the proper conception of the derogatory effect of forum selection clauses is not that the court is deprived of jurisdiction, but that such court will not exercise the jurisdiction it possesses in order to enforce the agreement and intent of the parties.<sup>39</sup> It may be noted that this is analogous to a forum non conveniens rationale in that both concern exercise of the court's discretion<sup>40</sup> in determining whether to decline the exercise of jurisdiction authorized by law in favor of a foreign forum.<sup>41</sup> Indeed it has been suggested that it would not be inconsistent to force the party attempting to uphold the choice of forum by asking that the non-selected forum dismiss

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<sup>37</sup> Reese, *supra* note 11, at 534. See also Perillo, *supra* note 13; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, Comment a (1971); A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 223 (9th ed. 1973); Farquharson, *supra* note 4 at 92 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972); *In re Unterweser Reederei, GMBH*, 446 F.2d 907, 908 (en banc) (5th Cir. 1971) (Wisdom, J., dissenting); *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806, 808 (2d Cir. 1955); *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965).

<sup>38</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80, Comment a (1971). Cf. EHRENZWEIG at 151, where he argues that parties are allowed to "legislate," or agree privately to deprive a competent court of jurisdiction, either when the agreement postdates the accrual of the cause of action, or when the agreement is between two aliens. But this appears to be a misconception, because, under jurisdictional concepts, the non-chosen court would still have the statutory power to ignore the parties' agreement. Cf. the public-private control dichotomy in text accompanying note 28, *supra*.

<sup>39</sup> *The Contractual Forum* at 189. "What this means in the mechanical sense is that the court will have jurisdiction to entertain all actions, but has the discretionary power to stay proceedings brought in breach of a choice of forum agreement." Farquharson, *supra* note 4, at 92.

<sup>40</sup> Judicial discretion has been defined as "A discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by reason and conscience of the judge to a just result." *Langnes v. Green*, 282 U.S. 531, 541 (1930).

<sup>41</sup> The basic case on the law of forum non conveniens is *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947). See also EHRENZWEIG at 121-27; R. WEINTRAUB, *supra* note 18, at 154-60; Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867 (1935); Ryan & Berger, *Forum Non Conveniens in California*, 1 PAC. L.J. 532 (1970). Compare the federal transfer statute, 28 U.S.C. § 1404(a) (1970): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955). California has codified the concept of forum non conveniens in its long-arm statute, CAL. CODE CIV. PRO. § 410.30 (1975), and see Ryan and Berger, *supra*.

the action to rely on forum non conveniens on the ground that any forum other than the one selected by the parties is prima facie inconvenient.<sup>42</sup> However, different factors will be significant in the court's decision in choice of forum cases as opposed to the straight forum non conveniens situation. In the latter instance, considerations of availability of witnesses, application of foreign law, protection of the local plaintiff's choice of forum, and availability of an alternate forum are likely to be decisive.<sup>43</sup> Basically, the presumption is against dismissing on forum non conveniens grounds and in favor of the plaintiff's chosen forum,<sup>44</sup> especially when the plaintiff is a forum resident.<sup>45</sup> In the choice of forum context, on the other hand, the presumption must be that the parties considered these factors when the agreement was made.<sup>46</sup> The significant factors, therefore, which determine the reasonableness of the choice of forum provision itself,<sup>47</sup> may not be the same. The presumption should be reversed in the choice of forum context to favor the parties' choice absent other indications of unreasonableness. It is submitted that under this theoretical formulation it is much more palatable for courts to give effect to the derogatory nature of choice of forum provisions, and this has undoubtedly been significant in the modification of the common law rule, as discussed below.

### III. HISTORICAL SKETCH OF THE AMERICAN VIEW PRIOR TO 1972

The following is intended as background in order to give some historical perspective to the problem of choice of forum provisions. This somewhat cursory examination of the trend of American thought concerning choice of forum clauses is necessarily brief both because of space limitations and because some

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<sup>42</sup> Casenote, 11 COLUM. J. TRANSNAT'L LAW 449, 451-52 (1972). See also *The Contractual Forum* at 198; Hay, *International Versus Interstate Conflicts Law in the United States*, 35 RABELS ZEITSCHRIFT 429, 442 (1971).

<sup>43</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); Ryan & Berger, *Forum Non Conveniens in California*, 1 PAC. L.J. 532 (1970).

<sup>44</sup> "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>45</sup> See Ryan & Berger, *supra* note 43 at 545-49, and cases cited therein.

<sup>46</sup> See Comment, 6 N.Y.U. J. INT'L. L. & POL. 369, 380 (1973).

<sup>47</sup> See Section VII, *infra*.

very good work has been done in this area to which the interested researcher may refer.<sup>48</sup>

The traditional view of the American courts was the common law approach;<sup>49</sup> the court would refuse to give effect to an agreement in derogation of the exercise of its jurisdiction. In other words, the courts "did not let the fact that they were not the chosen forum deter them from hearing the case."<sup>50</sup> An early decision consonant with this view was the Massachusetts case of *Nute v. Hamilton Mutual Insurance Co.*,<sup>51</sup> in which a choice of forum clause concerned venue in the domestic courts of a single state. Nevertheless, the court refused to give effect to the parties' choice to deny it the ability to determine the case when it was otherwise competent.<sup>52</sup> The reasons articulated for the decision were those generally given, that parties cannot by agreement alter legal rules regarding jurisdiction and venue since only the state has such power, and that public policy militates against allowing parties to change forum by agreement because of the potential for extra-legal motivation for such desires.<sup>53</sup> For the most part the traditional common law view prevailed through the mid-19th century in the United States.<sup>54</sup>

The application of the common law rule was not, however, absolute, and courts would give effect to a choice of forum clause in exceptional circumstances. For example, in *Mittenenthal v. Mascagni*,<sup>55</sup> the Massachusetts court refused to entertain an action in violation of a choice of forum agreement to determine all disputes in the courts of Florence, Italy. The special circumstances making such a provision "reasonable" were that both parties were foreigners<sup>56</sup> and that Mascagni was

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<sup>48</sup> For example, EHRENZWEIG at 147-53; A. EHRENZWEIG & E. JAYME, 2 PRIVATE INT'L. LAW § 181 (1973); R. WEINTRAUB, *supra* note 18, at 163-65; Lenhoff at 430-39; Nadelman, *supra* note 33; Reese, *supra* note 11; *The Contractual Forum*, *supra* note 22. See also Annot., 56 A.L.R.2d 300 (1957).

<sup>49</sup> Reese, *supra* note 11, at 534 [citing EHRENZWEIG at 148-53; *The Contractual Forum* at 187].

<sup>50</sup> *Id.*

<sup>51</sup> 72 Mass. 174 (1856).

<sup>52</sup> *Id.* at 184.

<sup>53</sup> *Id.*

<sup>54</sup> See Annot., 56 A.L.R. 300, 306-20 (1957).

<sup>55</sup> 66 N.E. 425 (Mass. 1903).

<sup>56</sup> The defendant was an Italian resident and citizen; the plaintiff was a New York

to travel through Europe and perform at numerous places in the United States and Canada under the contract so that the parties needed the certainty of a single forum.<sup>57</sup>

Another exception was often allowed when the choice of forum agreement was entered into after the cause of action arose. For instance, in *Gitler v. Russian Co.*,<sup>58</sup> a New York court upheld an agreement in which the plaintiff promised not to pursue a remedy in enforcement of a judgment except in the courts of Russia where such agreement was obtained for valuable consideration. The court distinguished this case from the general rule that parties could not "withdraw from the jurisdiction of the courts all future controversies that might arise respecting the relative rights of the contracting parties"<sup>59</sup> by establishing that parties could agree "not to submit to the courts a particular pending controversy."<sup>60</sup> That is to say that choice of forum clauses concerning litigation *in futuro* were not allowed, but such provisions concerning causes of action existing at the time the agreement was entered into would be upheld.<sup>61</sup> This may be functionally compared to a partial settlement agreement between the parties.

The erosion of the common law rule became apparent when Judge Learned Hand, in 1949 noted in dictum that "[i]n truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the

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resident, but he had in the contract elected domicile in Italy, and the court treated both as Italian citizens. 66 N.E. 425, 426.

<sup>57</sup> 66 N.E. at 426-27.

<sup>58</sup> 108 N.Y.S. 793 (Sup. Ct. 1903).

<sup>59</sup> *Id.* at 794, citing *Insurance Co. v. Morse*, 87 U.S. 445 (1874).

<sup>60</sup> 108 N.Y.S. at 794.

<sup>61</sup> See also *Akerly v. N.Y. Cent. R.R.*, 73 F. Supp. 903 (N.D. Ohio 1947); *Clark v. Lowden*, 48 F. Supp. 261 (D. Minn. 1942), *appeal dismissed per stipulation* 135 F. 2d 740 (8th Cir. 1943); *Detwiler v. Lowden*, 269 N.W. 367 (Minn. 1936); all upholding a voluntary forum limitation agreement entered into for valuable consideration after the cause of action arose under the Federal Employer's Liability Act (F.E.L.A.) [45 U.S.C. §§51-60 (1970)], on the ground that it was permissible to make such a choice of forum and thus did not contravene the F.E.L.A. section providing that the cause may be brought in any federal district court or state court which would otherwise have jurisdiction [45 U.S.C. §56 (1970)]. The express holding of these cases has been overruled by *Boyd v. Grand Trunk West. R.R.*, 338 U.S. 263 (1949), holding that 45 U.S.C. § 56 (1970), giving the plaintiff a statutory choice of forum is superior, and an agreement contrary to such statutory provision is inoperative. The application of the general exception is, however, undisturbed in nonstatutory cases.

*Restatement* [of Contracts § 558 (1932)], they are invalid only when unreasonable . . . ."<sup>62</sup> This statement marks the advancement of the "reasonableness" rule in evaluating the effect choice of forum agreements will be given. A 1951 Second Circuit case expressly illustrates application of the rule that choice of forum provisions will be upheld unless they are unreasonable, a tacit abandonment of the stricter common law approach. In *Cerro de Pasco Copper Corp. v. Knut Knutsen*,<sup>63</sup> goods were to be shipped from Peru to Norway with a bill of lading, drawn at the point of shipment (Peru), which conferred exclusive jurisdiction on Norwegian courts. The court determined that the agreement was not unreasonable and upheld the choice of court.<sup>64</sup> This case can be analogized to a forum non conveniens decision since there were no contacts with the United States except that it was the jurisdiction in which the defendant was found, and that such a forum was inconvenient in the face of an express choice.

The somewhat parallel development of the law concerning arbitration agreements should be noted here.<sup>65</sup> A court asked to stay its proceedings pending arbitration pursuant to an agreement by the parties is faced with the same conceptual question as is a court which is asked to dismiss because of a choice of forum stipulation. In each case the court is being

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<sup>62</sup> *Krenger v. Pennsylvania R.R.*, 174 F.2d 556, 561 (2d Cir. 1949). *But cf.* Bergman, *Contractual Restrictions on the Forum*, 48 CALIF. L. REV. 438, 440-45 (1960). "[I]t is very clear that if we look to the authorities he [Hand] cites for the broad proposition that these clauses are 'invalid only when unreasonable,' we must reach the conclusion that the authorities are more properly cited for the rule that these clauses are always unreasonable except where the doctrine of forum non conveniens may properly be applied." *Id.* at 443. Even assuming arguendo that this was true in 1960, it is clearly not so today since *Zapata* unequivocally states that choice of forum clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

<sup>63</sup> 187 F.2d 990 (2d Cir. 1951).

<sup>64</sup> *Id.* at 991.

<sup>65</sup> See generally A. DICEY & J. MORRIS, *supra* note 24, at 1091-96; EHRENZWEIG at 153-57; R. LEFLAR, *supra* note 17, at § 152; W. STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* § 15 (1930); LORENZEN, *Commercial Arbitration—International and Interstate Aspects*, 43 YALE L.J. 716 (1934); STERN, *The Conflict of Laws in Commercial Arbitration*, 17 LAW & CONTEMP. PROB. 567 (1952). Our only concern here is with the effect of the arbitration agreement on the court's exercise of jurisdiction, and not with other aspects of arbitration law such as the enforcement of arbitral awards or the law to be applied by the arbiters.

asked, in effect, to decline to exercise jurisdiction it is given by law in order to uphold a private agreement between the parties. Originally, most courts refused to stay actions pending arbitration because of the "revocability" of such agreements.<sup>66</sup> Ultimately, the rationale became the familiar one that parties could not, by private agreement, "oust" a court, otherwise competent, of jurisdiction.<sup>67</sup> Eventually, however, legislative enactments<sup>68</sup> evidenced a positive attitude toward arbitration agreements. Many now provide expressly for staying judicial action pending arbitration,<sup>69</sup> and such an attitude concerning stays is "well on the way to general acceptance."<sup>70</sup>

The reasonableness test was given a tremendous boost in the 1955 Second Circuit case of *Wm. H. Muller & Co. v. Swedish American Line Ltd.*<sup>71</sup> In *Muller*, the plaintiff was a New York corporation and was consignee for goods to be shipped from Gothenburg to Philadelphia on defendant's ship "Oklahoma." There was a choice of forum clause in the bill of lading which conferred jurisdiction exclusively on Swedish

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<sup>66</sup> Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 YALE L.J. 716 (1934), citing the classic Vynior's Case, 8 Co. 80a & 81b, 77 Eng. Rep. 597 (D.B. 1609). "Revocability" has been defined to mean either that actions may be maintained by either party to an arbitration provision in contravention of the agreement or that either party may end the agreement and any powers given to the arbiters by giving adequate notice. W. STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS*, 45 (1930).

<sup>67</sup> W. STURGES, *supra* note 65, at 45, citing *Kill v. Hollister*, 1 Wils. 129 (K.B. 1746); Lorenzen, *supra* note 65, at 717; Stern, *supra* note 65, at 572. See *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915); Annot., 56 A.L.R. 2d 300 (1957).

<sup>68</sup> E.g., Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-14 (1970) (applying only to interstate and foreign commerce, or maritime agreements); New York Arbitration Act of 1920, N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney 1963); English Arbitration Act of 1950, § 4.

<sup>69</sup> E.g., 9 U.S.C. § 3 (1970):

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

<sup>70</sup> EHRENZWEIG at 156. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, (1974), discussed at note 229 and accompanying text, *infra*. In *Scherk*, the court seemed to place arbitration clauses in a subcategory of choice of forum provisions.

<sup>71</sup> 224 F.2d 806 (2d Cir. 1955).



courts for determination of disputes under the contract. The ship was lost at sea, and the plaintiff sued in federal court contending that the choice of forum provision was invalid because contrary to the Carriage of Goods by Sea Act,<sup>72</sup> a section of which provides that clauses which relieve carrier from liability or lessen such liability are void.<sup>73</sup> The court determined that this choice of forum clause did not lessen the carrier's liability.<sup>74</sup> The court then went on to apply the reasonableness test to the choice of forum provision.

[T]he parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement the court has jurisdiction. But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented.<sup>75</sup>

The *Muller* Court listed five factors to be considered in determining the reasonableness of the forum limitation provision in this case: (1) Ownership of the ship and place of construction (when the ship was lost at sea); (2) the nationality and residence of the crew members; (3) whether the chosen court will apply the same measure of damages as the instant forum; (4) whether the chosen forum's limitation proceedings are more restrictive; and (5) the potential for fair and just adjudication of the case in the chosen forum.<sup>76</sup>

Unfortunately, the effectiveness of *Muller's* explanation was tarnished somewhat when it was overruled in *Indussa Corp. v. S.S. Ranborg*.<sup>77</sup> *Indussa* held that a choice of forum clause such as in *Muller* did in fact operate to lessen the liability of the carrier in contravention of the Carriage of Goods by

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<sup>72</sup> 46 U.S.C. §§ 1300-15 (1970).

<sup>73</sup> 46 U.S.C. § 1303(8) (1970).

<sup>74</sup> 224 F.2d at 807.

<sup>75</sup> *Id.* at 808.

<sup>76</sup> *Id.* Federal cases following the *Muller* rationale and applying the reasonableness test include *Takemura & Co. v. The S.S. Tsuneshima Maru*, 197 F. Supp. 909 (S.D.N.Y. 1961); *Skins Trading Corp. v. The S.S. Punta del Este*, 180 F. Supp. 609 (S.D.N.Y. 1960); *Chemical Carriers v. L. Smit & Co.'s Internationale S.*, 154 F. Supp. 886 (S.D.N.Y. 1957); *Murillo, Ltd. v. The Bio Bio, The Paraguay, The Argentina*, 127 F. Supp. 13 (2d Cir. 1955). See also EHRENZWEIG at 152, nn. 31 & 32, and cases cited.

<sup>77</sup> 377 F. 2d 200 (2d Cir. 1967).

Sea Act<sup>78</sup> and was thus ineffective and void.<sup>79</sup> Therefore, although *Indussa* did not affect *Muller's* application of the reasonableness test, the fact that *Muller* had been overruled "left its authority impaired on all counts."<sup>80</sup>

The continuing vitality of the traditional approach was evidenced in the 1958 Fifth Circuit case of *Carbon Black Export v. The S.S. Monrosa*.<sup>81</sup> In this case the bills of lading provided for exclusive jurisdiction in the courts of Italy for any actions for damages due to nondelivery of goods brought by the American consignee against the shipowner or its agents. The *Carbon Black* court held that the choice of forum clause would not be enforced to deprive it of the right to hear the case, citing the traditional rule that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."<sup>82</sup> The court attempted to distinguish *Muller* on the grounds that in the latter case the ship had been lost at sea, it was not an in rem action, and that the choice of forum clause therein was broader<sup>83</sup>— basically that in the case of an in rem proceeding under these facts, the United States was as convenient as the chosen forum. *Carbon Black*, then, seems to apply the basic common law view with the modification that the suit will not be entertained if the chosen court is the more convenient forum.<sup>84</sup>

In 1965, an important state case applying the reasonableness test was decided. In *Central Contracting Co. v. C.E. Youngdahl & Co.*,<sup>85</sup> a construction subcontract, to be performed in Pittsburgh, Pennsylvania, contained an exclusive

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<sup>78</sup> 46 U.S.C. § 1303(8) (1970).

<sup>79</sup> 377 F.2d at 204.

<sup>80</sup> Reese, *supra* note 11, at 536.

<sup>81</sup> 254 F. 2d 297 (5th Cir. 1958), *cert. granted* 358 U.S. 809 (1958), *petition for cert. dismissed* 359 U.S. 180 (1959). See also the discussion in text accompanying notes 26-35, *supra*.

<sup>82</sup> *Id.* at 300-01.

<sup>83</sup> *Id.* at 300.

<sup>84</sup> *Carbon Black* has been heavily criticized by commentators even though it probably represented the majority view when decided. See, e.g., Lenhoff, *supra* note 6; Maw, *Conflict Avoidance in International Contracts*, in *INTERNATIONAL CONTRACTS: CHOICE OF LAW & LANGUAGE* 23 (W. Reese ed. 1962); Reese, *supra* note 4; *The Contractual Forum*, *supra* note 22.

<sup>85</sup> 209 A.2d 810 (Pa. 1965).

choice of forum provision selecting New York County, New York, courts. The *Youngdahl* court applied the reasonableness test and gave effect to the express choice of forum. Concerning the consideration of reasonableness, the court stated that:

Such an agreement is unreasonable only where its enforcement would, under all the circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue his cause of action. Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things. If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then the plaintiff should be bound by his agreement. Moreover, the party seeking to obviate the agreement has the burden of proving its unreasonableness.<sup>86</sup>

This analysis of the application of the reasonableness rule is most significant, and will be discussed more fully below.

In *Central Contracting Co. v. Maryland Casualty Co.*,<sup>87</sup> the plaintiff performed a contract for the city of Pittsburgh and subsequently sued the city's surety in federal court for the balance due on the contract and for extra work claims. The surety contract contained a clause providing that any dispute under the contract was to be brought only in the courts of New York County, New York and also had a choice of law provision designating application of New York law. The Third Circuit applied the reasonableness test, citing *Youngdahl* and applying Pennsylvania law,<sup>88</sup> and upheld the effectiveness of the choice of forum clause upon a finding of no unreasonableness.<sup>89</sup> The court indicated that it considered two elements most significant in determining the reasonableness of the selected forum, distance from plaintiff's home office, and the complementary choice of law provision.<sup>90</sup> Oregon recently became an adherent to the reasonableness test when it overruled its previous cases

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<sup>86</sup> *Id.* at 816.

<sup>87</sup> 367 F.2d 341 (3d Cir. 1966).

<sup>88</sup> Although the court expressly stated that it was not deciding whether it was bound to apply the Pennsylvania position in a diversity case, *i.e.* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and note 10, *supra*, it did so nevertheless on the basis that it was increasingly becoming the preferred rule. 367 F.2d at 345-46.

<sup>89</sup> *Id.* at 344-45.

<sup>90</sup> *Id.*

following the common law approach in *Reeves v. The Chem Industrial Co.*<sup>91</sup> and upheld a choice of forum clause where it was found to be reasonable and, further, was not contained in a contract of adhesion.<sup>92</sup>

Almost all claims of right under choice of forum provisions involve a defensive posture; the defendant is normally attempting to persuade the court to dismiss or stay the action pending a determination by the chosen forum. However, conceivably a suit brought in violation of a choice of forum agreement would bring about a cause of action for damages for breach of contract although there is little case authority for this proposition.<sup>93</sup> It would perhaps be a good idea to include a liquidated damages provision in the contract relating to actions brought in violation of a choice of forum clause since actual damages from such breach might be somewhat difficult to ascertain.<sup>94</sup> A defendant might also attempt to enjoin proceedings brought in contravention of a choice of forum provision.<sup>95</sup> And in *Furbee v. Vantage Press, Inc.*,<sup>96</sup> the District of Columbia Court of Appeals awarded attorney's fees to the defendant where the plaintiff appealed the dismissal of an action brought in contravention to a forum selection agreement, ruling that the appeal was "without merit and frivolous," since the case law was clear and the plaintiff was aware of defendant's authorities.<sup>97</sup>

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<sup>91</sup> 495 P.2d 729 (Ore. 1972).

<sup>92</sup> *Id.* at 732. For a more complete listing of cases applying the reasonableness test to choice of forum clauses see RESTATEMENT (SECOND) OF CONFLICTS OF LAWS 80 (Reporter's note) (1971).

<sup>93</sup> See *The Contractual Forum* at 187; and *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. 174 (1856), which intimated in dictum that an action for damages would lie. No other case has been found which considers the possibility of damages.

<sup>94</sup> For the validity of liquidated damages clauses, see generally J. CALAMARI & J. PERILLO, *CONTRACTS* 366-70 (1970); C. McCORMICK, *DAMAGES* §§ 146-57 (1935). UNIFORM COMMERCIAL CODE § 2-718(1) provides that:

[d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

<sup>95</sup> See generally EHRENZWEIG at 183-84.

<sup>96</sup> 464 F.2d 835 (D.C. Cir. 1972).

<sup>97</sup> *Id.* at 837.

#### IV. THE VIEWS OF OTHER LEGAL SYSTEMS

A short diversion from the study of the American attitude toward choice of forum agreements will be made in order to consider the attitude of other nations toward such provisions. Again the primary concern will be with the derogatory effect of these provisions. The approaches taken toward the problem by other nations are relevant in that in an international contract one party may expect a choice of forum to be enforced or not as a matter of course.<sup>98</sup>

The general rule in England and the Commonwealth is that choice of forum provisions are *prima facie* valid if the chosen court is of "competent jurisdiction."<sup>99</sup> Older cases analogized forum selection clauses to agreements to arbitrate and thus governed by various arbitration statutes.<sup>100</sup> However, recent decisions have upheld such clauses on more straightforward grounds such as the theory that since one policy of contract law is to compel compliance with agreements, courts should not entertain an action brought in direct violation of such an agreement.<sup>101</sup> In certain situations a particular statute may govern and invalidate an otherwise effective choice of forum.<sup>102</sup> In the usual situation, although the choice of forum is *prima facie* valid, the decision whether to give effect to the choice of forum is within the discretion of the court, and the court will "weigh the competing interests of the parties."<sup>103</sup>

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<sup>98</sup> This brief analysis is basically for comparative purposes and is an amalgam synthesized from several law review articles which are indicated in the notes following.

<sup>99</sup> Cowen & Da Costa, *The Contractual Forum: Situation in England and the British Commonwealth*, 13 AM. J. COMP. L. 179, 180 (1964) [hereinafter cited as Cowen & Da Costa]. Decisions upholding forum selection clauses date back to 1796, *Gienar v. Meyer*, 2 H. Bl. 126 Eng. Rep. 728 (C.P. 1796).

<sup>100</sup> Cowen & Da Costa at 182, *citing* *Law v. Garrett*, 8 Ch. D. 26 (1878) as the case originating this reasoning. For other cases see Cowen & Da Costa at 182, nn. 25-28.

<sup>101</sup> Cowen & Da Costa at 182-83, *citing* *Racecourse Betting Control Board v. Secretary for Air*, [1944] 1 Ch. 114, 126 (C.A.).

<sup>102</sup> Cowen & Da Costa at 183 give as an example § 9(2) of the Australian Sea Carriage of Goods Act of 1924 providing that no agreement may in any way limit the exercise of jurisdiction by Australian courts respecting a bill of lading covering goods imported into Australia. *Cf. Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), discussed in text accompanying notes 77-80, *supra*.

<sup>103</sup> Cowen & Da Costa at 184, *citing* *The Fehmarn*, [1938] 1 Weekly L.R. 159 (C.A.), where the court permitted an action in contravention of a forum selection provision upon a showing by the plaintiff that to dismiss and uphold the agreement

This may be analogized to a reasonableness test.

Other western European countries, however, are less friendly to choice of forum clauses which purport to exclude national courts from exercising jurisdiction.<sup>104</sup> Spain flatly denies any derogatory effect to choice of forum agreements,<sup>105</sup> and Portugal only gives effect to them when they are contained in "contracts between aliens that are to be performed abroad and involve no property in Portugal."<sup>106</sup> The Italian view is that forum selection clauses in derogation of Italian court jurisdiction are generally ineffective and effect will be given to them only in cases with pecuniary subject matter between aliens or between an alien and a nonresident nondomiciliary citizen.<sup>107</sup> The Spanish, Portuguese, and Italian rules evidence a strong policy toward protecting local citizens by the guarantee of a local forum irrespective of contractual provision to the contrary. The attitude of the Netherlands seems relatively rational and is strikingly similar to the English explanation:<sup>108</sup> although the parties cannot change the rules of jurisdiction on their own, the courts will not entertain an action in contravention of the parties' choice of forum agreement so as not to take part in a breach of contract.<sup>109</sup> A choice of court provision in derogation of a national court will effectively proscribe litigating the issue in Austria, Belgium, France, Germany, Greece, and Switzerland except where the subject matter of the action concerns immovables within the state or where matters of public policy are involved.<sup>110</sup> Most western European countries require that choice of forum agreements be in writing. If they are contained in an adhesion contract,<sup>111</sup> they will only be enforced if separately signed by the party sought to be charged and if they

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might operate to deny him any remedy at all, and that England was in fact a more convenient forum. For further discussion of the English rule see A. DICEY & J. MORRIS, *supra* note 24, at 222-24, and cases cited therein.

<sup>104</sup> Perillo, *Selected Forum Agreements in Western Europe*, 13 AM. J. COMP. L. 162, 164 (1964).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 165, citing C. PRO. CIV., art. 2 (1942).

<sup>108</sup> See note 101, *supra*. See also text accompanying note 29, *supra*.

<sup>109</sup> Perillo, *supra* note 104 at 165.

<sup>110</sup> *Id.* at 165; Lenhoff, *supra* note 6, at 419-23.

<sup>111</sup> See note 200, *infra*.

involve a pecuniary dispute.<sup>112</sup> However, the bare fact that there is an adhesion contract will not render the contract ineffective. Also a choice of forum clause will ordinarily be allowed to operate in a prorogation sense and confer jurisdiction on a court on a consent rationale if the court is otherwise competent, especially regarding pecuniary matters.<sup>113</sup>

There are few existing Scandinavian decisions on the effectiveness of forum selection clauses because "parties take the validity of forum selection clauses for granted and . . . the lower courts, for their part, share this view."<sup>114</sup> It is necessary, then, to turn to the legal writings of scholars to evaluate the Scandinavian position. The prevalent view among Scandinavian legal writers is that "a valid forum selection clause excludes the forum which would, but for the stipulation, be a proper forum."<sup>115</sup> Thus actions brought in contravention of a choice of forum agreement will not usually be entertained. Forum selection provisions have to be written to be valid in Sweden, but not in Denmark and Norway.<sup>116</sup> Furthermore, the clause must expressly indicate the intent to choose a particular forum and specifically name the chosen jurisdiction but not a particular court therein.<sup>117</sup> Some matters, such as family law, patents, and trademarks, are thought to be peculiarly within the jurisdiction of the forum court so that choice of forum clauses concerning these subjects are ineffective.<sup>118</sup> Concerning the prorogatory operation of forum selection clauses, there must generally be some relationship between the chosen forum and the transaction in question without which the court may refuse to hear the cause.<sup>119</sup>

The positions of the Latin American countries evidence the same divergence of opinion that is apparent among European nations although the rules are less certain and seem to be in a state of flux. Guatemala, by statute, always allows an

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<sup>112</sup> Perillo, *supra* note 104, at 165.

<sup>113</sup> *Id.* at 164. See text accompanying notes 11-20, *supra*, for discussion of prorogatory aspect.

<sup>114</sup> Eek, *The Contractual Forum: Scandinavia*, 13 AM. J. COMP. L. 173, 174 (1964).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 175.

<sup>117</sup> *Id.* at 176.

<sup>118</sup> *Id.* at 176-77.

<sup>119</sup> *Id.* at 178.

action against a defendant at his domicile<sup>120</sup> so that exclusive jurisdiction clauses are rendered significantly less effective. Panama, on the other hand, permits derogation clauses to function effectively by statute.<sup>121</sup> Mexico and Cuba normally recognize choice of law agreements and allow them to have derogatory effect,<sup>122</sup> but the use of these domestic rules in the context of choice of forum clauses in international contracts is "questionable."<sup>123</sup> Brazil was formerly thought to be a jurisdiction which would give effect to a choice of forum provision in an international contract and refuse to hear an action in contravention of the agreement,<sup>124</sup> but apparently there is now some doubt as to Brazil's position.<sup>125</sup> A 1961 case indicates that now Brazil generally favors choice of forum clauses but tempers this inclination with considerations of fairness.<sup>126</sup> There are certain matters which must be brought in Brazilian courts, such as cases concerning Brazilian real property and labor disputes, so that derogatory choice of court provisions in these areas will not be enforced.<sup>127</sup> Originally Argentina also refused to entertain a cause of action in violation of a choice of forum clause<sup>128</sup> and allowed complete party autonomy. However, this rule was changed in 1936 by a case which held that an international contract with a choice of forum clause would not preclude Argentinian courts from hearing the matter on the basis of a constitutional provision giving federal courts sole jurisdiction

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<sup>120</sup> Schwind, *Derogation Clauses in Latin-American Law*, 13 AM. J. COMP. L. 167-68 (1964) [hereinafter cited as Schwind].

<sup>121</sup> *Id.* at 168, citing PANAMANIAN JUDICIARY CODE art. 237.

<sup>122</sup> They recognize and apply the chosen law rather than the law of the forum.

<sup>123</sup> Schwind at 168.

<sup>124</sup> *Id.* at 168-69, citing *Martinelli, S.A. v. Columbia, Cia. Nacional de Seguros*, Appeal No. 1,622 of August 31, 1954, 115 A.J. 319 (1955), where the court would not entertain a cause of action brought in violation of a choice of forum clause even though the defendant was a Brazilian domiciliary and delivery was to be effected there.

<sup>125</sup> Schwind at 169, and especially cases cited therein.

<sup>126</sup> *Id.* at 169-70, citing *Castagna v. Rubel*, case no. 7,909 of May 30, 1961, 203 Rev. For. 197 (1962). However, the author notes the uncertainty of the area by pointing out that this ruling may be reversed on the theory that jurisdiction concerns public policy and is not subject to waiver, thus meaning that no derogation clauses would be enforced. Schwind at 170. The Brazilian position seems roughly similar to the present American test. See Section V *infra*.

<sup>127</sup> Schwind at 170.

<sup>128</sup> *Id.*, citing *Montepagano v. Eriksen*, May 21, 1923, 138 Fallos 62, 10 J.A. 445 (1923).



over admiralty concerns.<sup>129</sup> The trend, then, in Latin American countries is not particularly favorable to upholding choice of forum clauses in international contracts.<sup>130</sup>

## V. THE SUPREME COURT ADOPTS THE REASONABLENESS TEST

By 1972, the reasonableness test in choice of forum stipulations, that the court would give effect to the parties' choice of forum and dismiss an action brought in contravention of such provision unless the party resisting application of the choice could show it was unreasonable, was a strong and increasingly popular minority position in the United States. It needed only a slight boost to make it clearly the favored rule one could confidently predict would be applied by the greater number of courts passing on this question in the future. That boost came when the United States Supreme Court adopted the reasonableness test in deciding whether to give effect to a choice of forum provision in *The Bremen v. Zapata Off-Shore Company*.<sup>131</sup>

The somewhat complicated, but nevertheless important, sequence of events leading to the Supreme Court decision in *Zapata* was as follows. The Zapata Off-Shore Company, an American corporation, solicited bids for towing the drilling rig "Chaparral" from Louisiana to the Adriatic Sea off Ravenna, Italy. A German corporation, Unterweser Reederei, was low bidder and submitted a draft contract to Zapata, which provided that all disputes under the contract would be brought before the Court of Justice in London, England, and also included a clause disclaiming any liability on the part of Unterweser "for defaults and/or errors in the navigation of the tow."<sup>132</sup> Zapata made a few suggestions for changes in the contract to which Unterweser agreed, but said nothing about the choice of forum and exculpatory provisions. After the tow got under way, the drilling rig was badly damaged by a storm in

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<sup>129</sup> Schwind at 171, citing *Compte y Cia. v. Ybarra y Cia.*, Nov. 16, 1936, 56 J.A. 355 (1936).

<sup>130</sup> Schwind at 173. He also notes that choice of forum provisions are generally allowed to have prorogative effect even if both parties are aliens, and especially if the subject matter has some relation to the forum. *Id.* at 167.

<sup>131</sup> 407 U.S. 1 (1972).

<sup>132</sup> *Id.* at 3, n. 2.

the Gulf of Mexico in international waters. Zapata instructed that the rig be taken to Tampa, Florida, the nearest safe haven, and subsequently sued Unterweser there in federal district court in contravention of the choice of forum provision in the contract, on the bases of negligence in towing the rig and breach of contract, asking for \$3,500,000 damages.

In the district court action, Unterweser moved to dismiss on grounds of the choice of forum clause in the contract and forum non conveniens and alternatively asked the court to stay the action until the dispute could be brought before the London Court of Justice. Unterweser then sued Zapata in the London court for breach of contract before the district court ruled on its motion. In the British action Zapata contested the jurisdiction of the London court but lost on this contention when the court ruled that the choice of forum clause was effective consent to its jurisdiction. This was affirmed on appeal.<sup>133</sup> Unterweser also filed a limitation action in the Florida federal district court just prior to the expiration of the 6 month period, and the court enjoined the parties from seeking additional remedies in other courts as is customary. Subsequently the district court refused to give effect to the choice of forum agreement on the traditional ground that agreements between parties to a contract attempting to confer exclusive jurisdiction on one court are invalid and unenforceable on public policy grounds. The court also denied Unterweser's forum non conveniens motion and granted Zapata's motion to enjoin Unterweser from proceeding in the London action.<sup>134</sup> A Fifth Circuit panel affirmed the district court,<sup>135</sup> and the decision was later adopted on a hearing en banc although 6 of the 14 judges dissented.<sup>136</sup> The majority applied the *Carbon Black* approach that choice of forum agreements prior to the inception of a cause of action are unenforceable as contrary to public policy and also indicated that litigation in a British court might materially affect Zapata's substantive rights because the disclaimer of liability provision would be unenforceable under United States federal

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<sup>133</sup> *Id.* at 4, n. 4; *Unterweser Reederei GMBH v. Zapata Off-Shore Co.*, [1968] 2 Ll. List L. Rep. 158.

<sup>134</sup> *In re Unterweser Reederei, GMBH*, 296 F. Supp. 733 (M.D. Fla. 1969).

<sup>135</sup> 428 F.2d 888 (5th Cir. 1970).

<sup>136</sup> 446 F.2d 907 (5th Cir. 1971).

law on public policy grounds although it apparently would be valid in England.<sup>137</sup> In dealing with the forum non conveniens argument, the majority suggested that trial in Florida would be at least as convenient to witnesses as trial in Great Britain since its only connection with the action was its having been selected as the forum by the parties. Judge Wisdom presented an excellent analysis of the problem in well-reasoned dissents in the panel decision<sup>138</sup> and upon the rehearing<sup>139</sup> in which he favored applying the reasonableness test, thereby relegating the parties to the chosen forum consistent with their agreement as well as overruling *Carbon Black*.<sup>140</sup>

The Supreme Court reversed the Fifth Circuit ruling in an 8-1 decision with Chief Justice Burger writing the majority opinion and Justice Douglas dissenting. The Court adopted the reasonableness approach in considering whether to give effect to the choice of forum clause, holding that such clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances."<sup>141</sup> Burger noted that a narrow view of choice of forum provisions would harm the expansion of American business activities in international markets, and speaking with evident disapproval of the traditional view espoused in *Carbon Black* noted that "the absolute aspects of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans."<sup>142</sup> The adopted rule is, the Court said, consonant with the "ancient concepts of freedom of contract" and serves

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<sup>137</sup> 407 U.S. at 8, n. 8; 428 F.2d at 895. It is perhaps questionable that the English court would apply English law absent a choice of law provision as well as the absence of any contacts whatsoever with England aside from being the chosen forum. At any rate it seems alien to the American rule and would be based on the idea that choice of forum also implies choice of law: *qui elegit judicem elegit jus*. But there are indications that the English courts do assume that choice of forum implies choice of law. See Cowen & Da Costa, *supra* note 99, at 181, n. 235.

<sup>138</sup> 428 F.2d 888, 896 (5th Cir. 1970) (Wisdom, J., dissenting).

<sup>139</sup> 446 F.2d 907, 908 (5th Cir. 1971) (Wisdom, J., dissenting).

<sup>140</sup> 428 F.2d at 898, 911. The statement concerning the sequence of events was from 407 U.S. at 1-8.

<sup>141</sup> 407 U.S. at 10, *citing, inter alia* Central Contracting Corp. v. Maryland Casualty Co., 367 F.2d 341 (3d Cir. 1966); Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir. 1955); Central Contracting Co. v. C.E. Youngdahl & Co., 209 A.2d 810 (Pa. 1965).

<sup>142</sup> 407 U.S. at 8-9.

to promote this policy to a significant extent.<sup>143</sup> The Court viewed the choice of forum as material because of the need to eliminate uncertainties as to the place of suit by selecting a forum in advance and because such agreements constitute an "indispensable element in international trade, commerce, and contracting."<sup>144</sup> Chief Justice Burger understood that the real issue in the case was not "ouster" of jurisdiction but whether a court should give effect to the freely negotiated choice of the parties and uphold their expectations,<sup>145</sup> thus avoiding the doctrinal misconception that has plagued many previous courts upholding the traditional rule.<sup>146</sup>

In considering the issue of the reasonableness of the forum selection agreement, the Court emphasized several factors. First, it was noted that the chosen forum was completely neutral as between two parties of diverse nationality.<sup>147</sup> Second, the contract was freely negotiated between "experienced and sophisticated businessmen;"<sup>148</sup> it was not an instance of the use of "overweening bargaining power"<sup>149</sup> and was thus not a contract of adhesion—Zapata had other alternatives. Third, there was no evidence of undue influence or fraud.<sup>150</sup> Burger disposed of Zapata's contention that the forum clause was unenforceable because the English view validating the disclaimer would violate a strong public policy of the forum, another element in the reasonableness determination, by distinguishing the federal rule that such exculpatory clauses were unenforceable.<sup>151</sup> The federal rule relates only to towage within American waters. The policy bases for the rule—discouragement of negligence and fear that inequality of bargaining power produced the stipulation—were not involved here since the negligence, if any, occurred in international waters and since the contract was freely

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<sup>143</sup> *Id.* at 11. See generally, Yntema, "Autonomy" in *Choice of Law*, 1 AM. J. COMP. L. 341 (1952); Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553 (1957).

<sup>144</sup> 407 U.S. at 13-14.

<sup>145</sup> *Id.* at 12.

<sup>146</sup> See text accompanying note 37, *supra*.

<sup>147</sup> 407 U.S. at 12.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

bargained for and entered into.<sup>152</sup> One may fairly assume that the contract price considered the exculpatory provision—the parties got what they bargained for, and absent adhesion, fraud, duress, public policy, and any other reasonableness consideration, the parties' choice should not be disturbed.

The inconvenience of the chosen forum to a party to a contract is another element of reasonableness. The Court held that to render a choice of forum provision ineffective on this basis, the forum selected must be "*seriously* inconvenient for the trial of the action."<sup>153</sup> Serious inconvenience was defined to mean that one party would be "effectively deprived of a meaningful day in court."<sup>154</sup> The case was remanded to allow Zapata an opportunity to prove that the London court was seriously inconvenient although the Court noted that this would be a "heavy burden" since the neutrality of forum did not seem to inconvenience one party any more than the other and represented a reasonable compromise under the circumstances.<sup>155</sup> Realistically, it is unlikely that a party will be able to prove serious inconvenience—"effective denial of a meaningful day in court"—merely because the chosen forum would be more inconvenient and expensive; after all, the assumption is that if the chosen forum is slightly inconvenient, the party must have received consideration in return for making this agreement to its detriment.<sup>156</sup> To demonstrate serious inconvenience and thus unreasonableness it will probably be necessary for the party to prove that relegation to the chosen forum would operate to deny it an effective remedy. Justice Douglas' dissent was reasoned somewhat along these lines. He felt that the *Bisso* doctrine prohibiting limitation of liability for negligence in towage contracts was applicable, and that since English courts do not apply such a rule, to compel Zapata to litigate in the foreign forum would materially affect its substantive rights.<sup>157</sup>

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<sup>152</sup> 407 U.S. at 15-16.

<sup>153</sup> *Id.* at 16.

<sup>154</sup> *Id.* at 19.

<sup>155</sup> *Id.*

<sup>156</sup> See *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965).

<sup>157</sup> 407 U.S. at 20-24 (Douglas, J., dissenting). Douglas also indicated that the action of Unterweser in seeking a limitation action was effective consent to the jurisdiction of the district court.

## VI. OTHER FACTORS

The decision in *Zapata* means that the reasonableness test has truly arrived. As indicated in Section III, above, the road to acceptance has not been without obstacles. Progressive opinions supporting the reasonableness test in spite of the contrary common law approach have been, of course, tremendously influential. But there have been other institutions that have pressed for a change in the traditional rule and that have reflected the changes which occurred. Consideration of these sources—the Hague Convention on Choice of Court, the Model Choice of Forum Act, the Uniform Commercial Code, and the Restatement (Second) of Conflicts of Laws—has been postponed to this point because of the instruction they offer concerning reasonableness and because of the need to consider them along with the discussion of reasonableness in the next section.

The Hague Convention on the Choice of Court was approved by the 10th Session of the Hague Conference on Private International Law in 1964.<sup>158</sup> It adopted the view that choice of forum provisions are presumptively valid both in prorogative and derogative senses and that no court other than the selected one should entertain an action covered by the agreement with the exception of certain defined situations. An analogy to the reasonableness approach is found in article 4 which provides that “[t]he agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means.”<sup>159</sup> This language gives the court considerable leeway to determine whether it would be just to uphold the choice of forum. Professor Reese calls it a “safety valve”<sup>160</sup>—but it is still somewhat narrower than the discretion allowed the court under the American approach. Other exceptional situations include a nonexclusive choice of forum and those cases in which a nonselected court is required by statute to hear the suit.<sup>161</sup> Finally, the Convention is expressly made inapplicable to areas which are traditionally thought to be of

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<sup>158</sup> The text of the Hague Convention on Choice of Court may be found in 4 INT'L LEGAL MAT. 348-49 (1965).

<sup>159</sup> 4 INT'L LEGAL MAT. 348 (1965).

<sup>160</sup> Reese, *supra* note 4, at 204.

<sup>161</sup> HAGUE CONVENTION ON CHOICE OF COURT art. 6 (1964).

peculiar local concern and where important local public policy considerations are likely to be operative, including matters concerning family law, succession, insolvency proceedings, and rights in immovable property.<sup>162</sup>

The Hague Convention has been ratified by only one state, Israel, as far as can be determined, and one authority says that ratifications are not seriously expected in the future although the reason for this is not evident.<sup>163</sup> Its significance, however, lies in its indication of the increasing acceptance of the idea that choice of forum agreements are presumptively valid and will be enforced absent a showing of good reason to contravene the stipulation of the parties.

The Hague Convention also influenced the American Model Choice of Forum Act,<sup>164</sup> which was based on its provisions. The Model Act also provides that an unselected court must give effect to the choice of the parties and refuse to entertain the action unless designated circumstances exist<sup>165</sup> as well as giving validity to the prorogation aspects of such an agreement.<sup>166</sup> The Act contains a built-in reasonableness test in that it provides that a court may refuse to give effect to the parties' choice of forum if it finds that:

- . . . (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
- (3) the other state would be a substantially less convenient place for the trial of the action than this state;
- (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
- (5) it would for some other reason be unfair or unreasonable to enforce the agreement.<sup>167</sup>

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<sup>162</sup> *Id.* at art. 2.

<sup>163</sup> Nadelman, *supra* note 33, at 132. In another international development, a United Nations committee on international trade working on a revision of the Bill of Lading Convention of 1924 has suggested that choice of forum clauses should contain several alternative fora to insure fairness to both parties. *Id.* at 134-35.

<sup>164</sup> The text of the Act may be found in Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969). The MODEL ACT has been adopted by only four states in the United States: Illinois, Nebraska, New Hampshire, and North Dakota. 1974 HANDBOOK OF THE NATIONAL CONFERENCE ON UNIFORM STATE LAWS 951(d), 1020 (1974).

<sup>165</sup> MODEL CHOICE OF FORUM ACT, § 2 (1968).

<sup>166</sup> *Id.* at § 3.

<sup>167</sup> *Id.*

It is evident that the Model Act is much broader in its excepted situations than the Hague Convention and gives much more discretion to the court in its determination of whether to enforce the choice.<sup>168</sup> These exceptions constitute the basic American test of reasonableness and will be discussed in more detail in the next section.

Another significant influence on the general area of party autonomy has been the Uniform Commercial Code. Although the U.C.C. does not deal specifically with choice of forum, its liberal provisions on choice of law by the parties<sup>169</sup> and its near universal acceptance have served to advance the cause of party autonomy in the choice of forum as well.<sup>170</sup>

Finally, the Restatement (Second) of Conflict of Laws promulgated in 1971 reflects the legal trend in its adoption of the reasonableness test. Section 80 provides that: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."<sup>171</sup> The prestige of the American Law Institute, the promulgator of the Restatement, and the frequency of court citation of the Restatement indicate the tremendous influence which the document has.<sup>172</sup> Its position on choice of forum agreement is both an indication of the better rule and a potent influence for its adoption in the future.

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<sup>168</sup> See Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969).

<sup>169</sup> § 1-105(1) provides that "... when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." Some might deny that § 1-105 is "liberal" in its choice of law provisions because of the requirement that the contractual transaction have a "reasonable relation" to the state whose law is chosen. Irrespective of whether the provision is characterized as "liberal" or "restrictive," a fair case may be made for the position that a provision choosing the law of a state which has no reasonable relation to the transaction violates due process. See Subsection VIII B, *infra*. The requirement of "reasonable relation" may be of constitutional necessity. What many undoubtedly characterize as more restrictive than the traditional rule is the further provision in §1-105 that absent choice by the parties the law of the forum shall be applied where the transaction has an "appropriate relation" to the forum. However, the rule when the parties do choose is relatively tolerant of party autonomy. For construction of the terms "reasonable relation" and "appropriate relation," see Annot., 63 A.L.R.3d 341. (1975).

<sup>170</sup> See generally Nordstrom, *Choice of Law and the Uniform Commercial Code*, 24 OHIO ST. L.J. 364 (1963).

<sup>171</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

<sup>172</sup> See M. PRICE & H. BITTNER, *EFFECTIVE LEGAL RESEARCH* 273 (1969).



## VII. THE REASONABLENESS TEST AND OTHER DEFENSES TO THE CHOICE

The modern American rule, as indicated in the Restatement (Second) of Conflict of Laws, the Model Act, and the leading cases, is that courts should give effect to the parties' choice of a particular forum and refuse to entertain an action outside the chosen forum unless it would be unfair or unreasonable to do so. Because of this, a basic defense of a party seeking to maintain an action in contravention of a forum selection agreement is that the choice is unreasonable. It is necessary, then, to determine the parameters of reasonableness and the factors which will lead a court to deny effectiveness to a choice of forum agreement on grounds of unreasonableness.

Functionally, the disparate elements of reasonableness identified in the cases and other writings may be divided into four basic groups: that the chosen forum is a substantially less convenient place for trial, that the plaintiff may be unable to obtain effective relief in the chosen forum, that the choice of forum agreement is unconscionable, and that the agreement is otherwise unreasonable. It might also be noted that although the elements are stated separately in the Model Act, they often overlap and may not always be analytically different.

### A. *Substantial Inconvenience*

The Model Act provides that a nonselected court should not give effect to the choice if the chosen forum would be a "substantially less convenient place for the trial" than the instant forum.<sup>173</sup> This defense will not be successful in the usual case, because the presumption is that consideration was received at the time of contracting for the alleged inconvenience<sup>174</sup> and the party should get what he bargained for unless it is otherwise unfair. Therefore, this element of serious inconvenience, as in *Zapata*, merges somewhat into considerations of denial of effective remedy.<sup>175</sup> In *Brown v. Gingiss Int'l.*,

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<sup>173</sup> MODEL CHOICE OF FORUM ACT § 3(3) (1968).

<sup>174</sup> See *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965).

<sup>175</sup> See text accompanying notes 153-56, *supra*.

*Inc.*,<sup>176</sup> the plaintiff lived in Wisconsin while the chosen forum was Chicago.<sup>177</sup> The federal district court sitting in Wisconsin, in enforcing the choice and ordering a change of venue to the selected forum,<sup>178</sup> pointed out that the distance from plaintiff's domicile was short, and that the additional cost of obtaining local counsel in Chicago was insufficient to show the significant inconvenience necessary to render the choice unreasonable.<sup>179</sup>

However, there are some instances in which the chosen forum, even though due consideration was presumably given in the negotiation, is so manifestly inconvenient for all involved—the court, parties, and witnesses—as to be unfair and unreasonable. In *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*,<sup>180</sup> the parties had entered into a contract whereby the defendant granted plaintiff exclusive sales rights for Hawaii for memberships in a credit card program. The franchise agreement had a clause providing that any dispute under the contract would be determined in California courts applying California law. The defendant allegedly breached the contract by granting a similar franchise to another, and the plaintiff sued in Hawaii federal district court.<sup>181</sup> The federal district court refused to uphold the choice of forum provision due to its unreasonableness. The court reasoned that the chosen forum would be a seriously inconvenient place for the trial because the business in question was in Hawaii and all witnesses and evidence concerning the alleged wrongful acts were also in Hawaii.<sup>182</sup> Further, the chosen forum was not completely neutral since the defendant was located there, nor did it have any special expertise in the matter to be determined. To hold the trial there would have presented problems for most of its participants.<sup>183</sup>

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<sup>176</sup> 360 F. Supp. 1042 (E.D. Wis. 1973).

<sup>177</sup> *Id.*

<sup>178</sup> Pursuant to 28 U.S.C. § 1404(a) (1970).

<sup>179</sup> 360 F. Supp. at 1044. *See also* Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344-45 (3d Cir. 1966).

<sup>180</sup> 290 F. Supp. 848 (D. Hawaii 1968).

<sup>181</sup> *Id.* at 849-51.

<sup>182</sup> *Id.* at 851-52.

<sup>183</sup> The facts of this case might also suggest an adhesive situation or at least a provision to which little attention was given and underscores the statement made in the text above concerning the overlapping of the elements of unreasonableness. The

The federal district court in *Copperweld Steel Co. v. Demag-Mannesmann-Boehler*<sup>184</sup> reasoned along similar lines. This case involved a contract for the sale and construction of a plant on plaintiff's property in Ohio by a German corporation with a choice of forum clause designating German courts. The plaintiff claimed that the plant's performance was unsatisfactory and sued in Pennsylvania for breach of contract.<sup>185</sup> The court applied the reasonableness test of *Youngdahl* and *Maryland Casualty* and determined that the choice of forum clause was unreasonable. The court noted that the plant was fabricated in the United States; that all records concerning its operation, as well as the plant operators, were here; that plaintiff's contract negotiation personnel and defendant's sales personnel involved in the transaction were here; and that since the transaction had previously been conducted in English and most witnesses were English speaking, it would be very inconvenient to relegate the cause to a German court and "require translation with its inherent inaccuracy."<sup>186</sup> Implicit in this reasoning was the thought that the German forum would be a seriously inconvenient place for the trial. These courts seem to be applying a basic forum non conveniens test,<sup>187</sup> which will, on the proper facts, override the voluntary choice of forum made by the parties.<sup>188</sup>

## B. Denial of an Effective Remedy

A second indication of unreasonableness is that the plaintiff will be unable to obtain effective relief, for whatever reason, in the chosen forum.<sup>189</sup> A comment to the Model Act states that

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adhesive situation brings up the question of the court's function in an arm's length transaction: should the agreement be enforced, or should relief be given to one party? When the court does give relief, is it protecting a party from overreaching, or is it provincially protecting a party that did not know what it was doing by entering into a bad bargain?

<sup>184</sup> 54 F.R.D. 539 (W.D. Pa. 1972).

<sup>185</sup> *Id.* at 540.

<sup>186</sup> *Id.* at 542.

<sup>187</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); F. JAMES, CIVIL PROCEDURE § 12.17 (1965).

<sup>188</sup> See text accompanying notes 39-47, *supra*, for a discussion of forum non conveniens and choice of forum.

<sup>189</sup> MODEL CHOICE OF FORUM ACT § 3(2) (1968).

this will probably be consistent with the parties' intentions because "[t]hey can hardly have intended to require the plaintiff to bring suit in a state where he could at no time have obtained effective relief,"<sup>190</sup> and this seems to be a reasonable assumption.<sup>191</sup> For instance, in *Calzavara v. Biehl & Co.*,<sup>192</sup> a Louisiana resident bought a ticket for passage on an Italian ship, and the ticket contained a provision expressly conferring exclusive jurisdiction for any dispute resolution on the courts of Venice, Italy. The Louisiana court refused to give effect to the choice of forum stipulation in a suit against the shipping company's local agent, a Louisiana corporation, on the ground that enforcement of the choice of forum provision would deny the plaintiff a remedy since the Italian court would not exercise "effective" judicial jurisdiction in this instance.<sup>193</sup> The *Muller* court was also faced with this contention, and in determining that the plaintiff would not be denied an effective remedy in the chosen forum considered the measure of damages the chosen forum would apply, whether the action would be unduly restricted, and the general potential for a fair and just adjudication.<sup>194</sup> The plaintiff might also be denied a meaningful remedy where the chosen court is unable to get jurisdiction,<sup>195</sup> where the chosen forum's judgment would be potentially unenforceable,<sup>196</sup> or where it is otherwise uncertain that the defendant would appear in the chosen forum.<sup>197</sup> This element of denial of an effective remedy may be conceived either as a denial of due process or as unconscionable in the enforcement of such a one-sided agreement.

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<sup>190</sup> *Id.*, comment on § 3(2). But see Sedler, *The Contracts Provisions of The Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 291-93 (1972).

<sup>191</sup> But cf. Sedler, *supra* note 190, at 291-93.

<sup>192</sup> 181 So. 2d 809 (La. App. 1966).

<sup>193</sup> *Id.* at 811. Again, this could be construed as an adhesive situation; see subsection VII C, *infra*.

<sup>194</sup> *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806, 808 (2d Cir. 1955). See also discussion in text accompanying notes 153-56, *supra*.

<sup>195</sup> *Cowens & Da Costa*, *supra* note 27, at 180; Casenote, 11 COLUM. J. TRANSNAT'L LAW 449, 454-55 (1972).

<sup>196</sup> Reese, *supra* note 4, at 203.

<sup>197</sup> Casenote, 11 COLUM. J. TRANSNAT'L LAW 449, 454-55 (1972).

### C. Unconscionability

Another component of a consideration of unreasonableness is whether the contract containing the choice of forum clause "was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means."<sup>198</sup> This would include, first of all, the defenses of fraud, duress, or other unconscionability which are all regularly used to invalidate contractual provisions<sup>199</sup> and which present no particular problem. Almost everyone agrees that a contract obtained by fraudulent means should not be enforced. It would also encompass, however, adhesion ("take-it-or-leave-it") contracts resulting from an inequality of bargaining power and its consequent abuse.<sup>200</sup> Although such contracts are often enforced in other contexts,<sup>201</sup> apparently the potential for unfairness in the choice of forum situation is such that an exception to the general rule of enforcement is applied. Functionally, of course, the problem of adhesion contracts is part of the larger issue of unconscionability.

The fear of the courts in this context is that the absence of equal bargaining power might indicate that the weaker party did not freely consent to the choice of forum clause. If he wanted the goods or services, or whatever the economically superior party offered, he was compelled to accept the terms dictated by the other party. Consequently, there was no real agreement and the presumption of due consideration is shaken. The commentators are in general agreement that choice of forum provisions contained in contracts of adhesion may con-

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<sup>198</sup> MODEL CHOICE OF FORUM ACT § 3(4) (1968).

<sup>199</sup> Cf. Sedler, *supra* note 190, at 293.

<sup>200</sup> For the general theory of adhesion contracts, see Kessler, *Contracts of Adhesion: Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); EHRENZWEIG, *supra* note 5, at 456-57. Basically, an adhesion contract is a standardized contract, usually favoring the offeror, offered continually to any number of offerees by an offeror who possesses superior economic bargaining power, the terms to which the offeree must agree if he wants the product either because the offeror is in a monopolistic position or because all purveyors of the desired goods or services include such terms. It is dictation of contractual terms by the party in a superior (usually economic) bargaining position to which anyone wishing to acquire the product must "adhere." See also Bolgar, *Contracts of Adhesion: A Comparison of Theory and Practice*, 20 AM. J. COMP. L. 53 (1972); *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (an adhesion contract evidences no true agreement).

<sup>201</sup> See Sedler, *supra* note 190, at 290-91.

stitute the requisite unreasonableness and justify a court's refusal to give effect to the choice.<sup>202</sup> Furthermore in *Zapata* the Supreme Court felt constrained to emphasize the equal bargaining position of the parties, the "arms-length negotiation by experienced and sophisticated businessmen,"<sup>203</sup> to negative the adhesion contract argument.

*Matthiessen v. National Trailer Convoy, Inc.*,<sup>204</sup> serves to illustrate the application of this theory. This case was an action for personal injuries brought against the owner of a moving van. The owner denied negligence and joined the lessee of the van as a third-party defendant, contending that the lease agreement provided that the lessee would defend and indemnify the owner for claims arising from the van's operation. The lease agreement included a provision designating the Fulton County, Georgia courts as the exclusive forum for dispute resolution under the lease.<sup>205</sup> The federal district court applied the reasonableness test to the choice of forum provision, and determined that the choice was unreasonable because "it is doubtful that the jurisdictional limitation was equally bargained for."<sup>206</sup> That is to say, the choice is unreasonable and unfair and thus undeserving of a voluntary exercise of judicial discretion in refusing to take jurisdiction which the court otherwise has if the choice of forum provision appears in an adhesion contract.

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<sup>202</sup> E.g., R. WEINTRAUB, *supra* note 18, at 164; Lenhoff, *supra* note 6, at 438; Reese, *supra* note 11, at 537; *The Contractual Forum* at 189.

<sup>203</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

<sup>204</sup> 294 F. Supp. 1132 (D. Minn. 1968).

<sup>205</sup> *Id.* at 1132-33.

<sup>206</sup> *Id.* at 1135. The court also noted that the exclusive forum stipulation was probably unreasonable on other grounds as well, *viz.*, that the third-party plaintiff (owner) would be denied a remedy if the agreement were enforced because of the additional expense of litigating in the chosen forum. *Id.* That is, the third-party plaintiff will be denied an effective remedy should the provision be given effect. However, the fact that a party will incur the additional expense litigating in the chosen forum is generally not sufficient standing alone. See *Brown v. Gingiss Int'l, Inc.*, 360 F. Supp. 1042, 1044 (E.D. Wis. 1973); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 344-45 (3d Cir. 1966); and text accompanying notes 173-179, *supra*. To overcome the presumption of due consideration for the inconvenience, it is necessary to demonstrate the invalidity of the consideration, *i.e.*, that there was no true "agreement" because the inequality of bargaining power resulted in an adhesion contract. See *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). However, where it is alleged that compelling a party to litigate in the chosen forum would *completely deny* a remedy because of cost rather than simply being more expensive it is conceivable that this might of itself invalidate the choice.

*Matthiessen* is further complicated because the plaintiff was not a party to the forum selection provision, thus presenting the question of whether two parties may stipulate a forum to cover all eventualities in their transaction even when it would operate on one who was not a party to the agreement. *Matthiessen* seems to indicate that the contracting parties cannot do so. The third-party dimension does not weaken the opinion's support of the unconscionability element, however, because the question could have involved only the relationship of the contracting parties with each other.

#### D. *Other Indications of Unreasonableness*

The remaining elements of unreasonableness in the choice of forum context may be considered in a broad, general manner where, in the words of the Model Act, "it would for some other reason be unfair or unreasonable to enforce the agreement."<sup>207</sup> Cases involving significant inconvenience,<sup>208</sup> for instance, might also be considered as otherwise unreasonable. Of course, the party resisting the enforcement of the choice of forum provision must "clearly show" the unreasonableness or unfairness of the choice.<sup>209</sup>

Another indication of unreasonableness might be where a chosen forum would apply a rule of law which was *materially* different from the rule of substantially interested states.<sup>210</sup> The basic issue here is whether a choice of forum clause can in fact operate as a choice of law provision. The probable American view is that the choice of forum is a separate aspect and that choice of law will not be presumed from choice of forum. The court will apply its choice of law rules to determine the applicable law notwithstanding its selection as the exclusive forum by agreement of the parties. Therefore, where this approach is applied, the court which refuses to entertain the action on the basis of a choice of forum provision need not be concerned with

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<sup>207</sup> MODEL CHOICE OF FORUM ACT § 3(5) (1968).

<sup>208</sup> *Copperweld Steel Co. v. Demag-Mannesmann-Boehler*, 54 F.R.D. 539 (W.D. Pa. 1972); *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848 (D. Hawaii 1968).

<sup>209</sup> *Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973).

<sup>210</sup> *Reese*, *supra* note 11, at 537. For a more extensive discussion, see subsection VII A, *infra*.

the rule of law to be applied by the chosen forum, assuming a rational choice of law rule, because the chosen forum will, in its choice of law determination, consider the interests of other states concerned with the matter. In contract law, at any rate, American jurisdictions give consideration to these interests under the "localizing approach" to the choice of law based on factual contracts.<sup>211</sup>

Where for some reason the chosen forum would not give consideration to the interests of concerned states in its choice of law determination, however, but would apply a rule which is materially different from those of the concerned states—whether it is the forum's own rule or not—the court which is asked to dismiss or stay its exercise of jurisdiction is confronted with a significant problem. On the one hand, the parties to the contract presumably knew the choice of law rules of the chosen forum, and their agreement to use it for dispute resolution is tacit consent to application of its choice of law rules. On the other hand, the court being asked to exercise its discretion and dismiss the action should not permit the choice of forum to designate the applicable law where it would not allow an express choice of law to do so.<sup>212</sup> For instance in *Zapata*, had the court determined that the London Court of Justice, a totally disinterested forum, would apply a rule contrary to the rule of the interested states,<sup>213</sup> it could be argued that it should not have enforced the choice since it would not have allowed the parties to choose to apply the law of a completely disinterested state. The general view is that the state whose law is chosen must have a reasonable relationship to the transaction.<sup>214</sup> Under this view, the court would have denied effect to the choice of the forum provision.

Furthermore, if the rule to be applied by the chosen jurisdiction is contrary to a strong underlying policy of the rule of the nonchosen forum, the latter may refuse to give effect to the choice on public policy grounds regardless of whether the cho-

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<sup>211</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1972); Sedler, *supra* note 190, at 300.

<sup>212</sup> See Reese, *supra* note 11, at 539.

<sup>213</sup> The United States was the place of incorporation of *Zapata* and Germany was the place of incorporation of *Unterweser*.

<sup>214</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).



sen forum is disinterested or not, or whether it would consider the interests of concerned states.<sup>215</sup> Again, this is an application of the rule that the court should not permit the choice of forum provision to do what it would not let a choice of law clause do. Thus, if the court would not give effect to choice of a certain state's law on public policy grounds, it should not enforce a choice of forum which would accomplish the same thing.

Also, if the chosen forum would apply a rule which was contrary to the rule of all interested states, the party resisting the agreement might well argue that to relegate him to such a forum would deny him due process.<sup>216</sup> Generally, a forum which lacks any contacts with a transaction may not apply its own law to decide the controversy.<sup>217</sup> This argument could be applied to *Zapata* had the American rule of invalidity of exculpatory clauses not been held inapplicable and had the German rule been consonant with the American rule. There was evidence that the English rule would uphold the exculpatory clause in the contract and that the English court would apply this rule notwithstanding its lack of contacts.<sup>218</sup> Therefore, if the rule of the only two interested states, the United States and Germany, were contrary, a due process argument might successfully be made.

Another defense to the application of the prima facie validity rule is actually unrelated to reasonableness. In general, where the plaintiff had a choice of forum by statute, or where a court is statutorily required to hear an action, a choice of forum agreement to the contrary is inoperative.<sup>219</sup> For instance, in *Boyd v. Grand Trunk Western R.R. Co.*,<sup>220</sup> the Supreme Court held that the Federal Employers Liability Act provision allowing an employee to bring suit in state or federal district court where the defendant resides, where the defendant does business, or where the cause of action arose<sup>221</sup> voids an exclusive choice of forum agreement limiting the plaintiff's forum to the

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<sup>215</sup> Reese, *supra* note 11, at 537.

<sup>216</sup> See discussion in subsection VII B, *infra*.

<sup>217</sup> Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

<sup>218</sup> 407 U.S. at 23.

<sup>219</sup> See MODEL CHOICE OF FORUM ACT § 3(1) (1968).

<sup>220</sup> 338 U.S. 263 (1949).

<sup>221</sup> 45 U.S.C. § 56 (1970).

jurisdiction where the cause of action arose.<sup>222</sup> Also, in *Wilko v. Swan*,<sup>223</sup> the Supreme Court refused to enforce an arbitration clause in a sale of securities contract on the ground that the Securities Act of 1933 allows a purchaser to "sue in any court of competent jurisdiction"<sup>224</sup> upon an allegation of a violation of the provisions of the Act, and that such an agreement was an attempt to waive compliance with the Act and was consequently void by express provision in the Act itself.<sup>225</sup> This reasoning was applied to a choice of forum provision in a securities sales contract by the Seventh Circuit in 1973.<sup>226</sup> However, in 1974, the Supreme Court reversed the Seventh Circuit and limited the scope of the *Wilko* exception when it held, in *Scherk v. Alberto-Culver Co.*,<sup>227</sup> that an arbitration provision in an *international* sale of securities agreement did not violate the Securities Act provision referred to above.<sup>228</sup> The majority reasoned that the considerations and policies involved in *Wilko* were materially different when the contract is international in context.<sup>229</sup>

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<sup>222</sup> 338 U.S. at 265. See also *Krenger v. Pennsylvania R.R.*, 174 F.2d 556 (2d Cir. 1949).

<sup>223</sup> 346 U.S. 427 (1953).

<sup>224</sup> 15 U.S.C. § 771(2) (1970).

<sup>225</sup> 15 U.S.C. § 77n (1970).

<sup>226</sup> *Alberto-Culver Co. v. Scherk*, 484 F.2d 611 (7th Cir. 1973).

<sup>227</sup> 417 U.S. 506 (1974).

<sup>228</sup> 15 U.S.C. §§ 77n, 771(2) (1970).

<sup>229</sup> 417 U.S. at 515-18. The Court stated that:

[R]espondent's reliance on *Wilko* . . . ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. *Alberto-Culver's* contract to purchase the business entities belonging to *Scherk* was a truly international agreement. *Alberto-Culver* is an American corporation with its principal place of business and the vast bulk of its activity in this country, while *Scherk* is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, and whose activities were largely, if not entirely, directed to European markets.

Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United

It might be posited, then, that the *prima facie* validity of a choice of forum provision does not extend to situations in which the choice encroaches to any extent on a statutory right to litigate in a particular or alternative forum. A closer analysis belies this position, however. Venue of any action is controlled by statute; and to give derogatory effect to a forum selection clause is bound to encroach on the venue statute. The probable explanation is that the specific cases in which the courts would not allow a forum selection provision to render a statutory venue provision ineffective involved matters which the courts felt were affected in some fashion with the public interest (*e.g.*, the securities cases), or in which the courts especially feared superior bargaining power (*e.g.*, F.E.L.A. cases).<sup>230</sup>

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States generally, and the federal securities laws in particular, would govern disputes arising out of the stock purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract. [footnote omitted]

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-law rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. [footnote omitted]

. . . . .  
The exception to the clear provisions of the Arbitration Act carved out by *Wilko* is simply inapposite to a case such as the one before us. In *Wilko* the Court reasoned that "[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him . . . ." 346 U.S. at 435. In the context of an international contract, however, these advantages become chimerical since, as indicated above, an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice. [footnote omitted]

Justice Douglas, joined by Justices Brennan, White, and Marshall, dissented, pointing out that "The virtue of certainty in international agreements may be important, but Congress has dictated that when there are sufficient contacts for our securities laws to apply, the policies expressed in those laws takes precedence." 417 U.S. at 534.

<sup>230</sup> See, *e.g.*, *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263 (1949); *Wilko v. Swan*, 346 U.S. 427 (1953).

### VIII. CHOICE OF FORUM AND CHOICE OF LAW: A POLICY CENTERED APPROACH

In deciding whether to give effect to a forum selection agreement, it is most unusual for a court to consider the implications of forum selection on the law to be applied in the resolution of the dispute.<sup>231</sup> Moreover, when the issue is examined at all, it is generally done tangentially in a discussion of whether the plaintiff would be denied an effective remedy because of an adverse effect on his substantive rights,<sup>232</sup> an apparently oblique manner of saying that the law which the chosen forum would probably apply would oppose a strong public policy of the nonchosen forum.<sup>233</sup> This appears to be a very important matter for a court to evaluate when it is asked to demur from exercising its jurisdiction, especially since parties often complement the choice of forum provision with an express choice of law, designating the law of the chosen forum.<sup>234</sup> Indeed, even without such an express choice of law, the chosen forum might imply a choice of its substantive law from the choice of forum.<sup>235</sup> The fact that it is not considered could indicate that

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<sup>231</sup> For example, in the following cases there was absolutely no indication that the laws of the concerned states differed or which law would be applied if the choice were effectuated. *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966); *Carbon Black Export v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958); *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1 (S.D.N.Y., 1974); *Brown v. Gingiss Int'l, Inc.*, 360 F. Supp. 1042 (E.D. Wis. 1973); *Copperweld Steel Co. v. Demag-Mannesman-Boehler*, 54 F.R.D. 539 (W.D. Pa. 1972); *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848 (D. Hawaii 1968); *Beirut Universal Bank v. Superior Court*, 74 Cal. Rptr. 333 (1969); *Reeves v. The Chem Industrial Co.*, 495 P.2d 729 (Ore. 1972); *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (Pa. 1965).

<sup>232</sup> See, e.g., *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 23 (1972) (Douglas, J., dissenting).

<sup>233</sup> See text accompanying note 261, *infra*.

<sup>234</sup> See, e.g., *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966); *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955); *Beirut Universal Bank v. Superior Court*, 74 Cal. Rptr. 333 (1969); *Reeves v. The Chem Industrial Co.*, 495 P.2d 729 (Ore. 1972).

<sup>235</sup> See, e.g., *Compagnie d'Armenement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.*, [1971] A.C. 572, 589, 597-98, 605-07 (H.L.) (indicating that there is a rebuttable presumption that an arbitration clause implies intent to choose the law of the place of arbitration although in this case the presumption was rebutted); *Lumus Co. v. Commonwealth Oil Refining Co.*, 280 F.2d 915, 924 (1st Cir. 1960) (arbitra-

the laws of the chosen forum and the nonchosen forum differ only infrequently. However, the parties are undoubtedly often fighting over more than the extra expense of bringing the action at another place, and the application of a different rule by the chosen forum could, of course, have a drastic effect on the outcome of the dispute. Since the nonchosen forum which is asked to effectuate the choice of the parties and refuse to entertain the action is usually either the domicile, state of nationality, residence, or principal place of business of the plaintiff,<sup>236</sup> the application of a rule by the chosen forum which would be contrary to the plaintiff's interest should be carefully considered.<sup>237</sup>

This consideration by the nonchosen court of the law to be applied by the chosen court should proceed in two contexts. First, the court should consider whether any strong policy of the forum is involved, and, if so, whether the forum has an interest in applying its law on the issue in question—either because by applying its own law, the forum would advance its own governmental interest, or because application of some other law by the nonchosen forum would subvert the interest of the forum.<sup>238</sup> Second, the court should evaluate whether the application of its law or of some other law by the chosen forum would be fair to the parties.<sup>239</sup> In other words, the court should

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tion clause). The United States Supreme Court seemed to uphold this view when it stated in dicta in a footnote that "[u]nder some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to the transaction." *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 519, n. 13 (1974). See also A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 735-36 (9th ed. 1973); Yntema, "Autonomy" in *Choice of Law*, 1 AM. J. COMP. L. 341, 352 (1952), for discussion on whether a choice of forum implies a choice of that forum's law.

<sup>236</sup> The only cases found where the nonchosen forum was not the domicile, state of nationality, residence, or principal place of business of the plaintiff were somewhat aberrant anyway; e.g., where the plaintiff was an assignee of the original party to the contract, *Spatz v. Nascone*, 364 F. Supp. 967 (W.D. Pa. 1973); where the plaintiff for the particular contract was a third-party plaintiff, *Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973); or where the plaintiff, although nominally a resident of the United States, had in the contract elected domicile in the chosen forum, *Mittenenthal v. Mascagin*, 66 N.E. 425 (Mass. 1903).

<sup>237</sup> This type of problem is noted in Comment, 6 N.Y.U.J. INT'L L. & POL. 369, 377-79 (1973).

<sup>238</sup> The basis of the "governmental interest analysis" espoused in the text is derived from B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* chs. 2 & 4 (1963).

<sup>239</sup> See the discussion in Sedler, *supra* note 190, at 302-15.

apply an "interest and fairness" test grounded in the policy-centered approach to the conflict of laws in evaluating the effect of a choice of forum on the law to be applied in resolving the dispute.<sup>240</sup> Assuming that such an approach is proper in the usual choice of law context, it should also prove useful when the applicable law is to be affected by an express choice of forum.<sup>241</sup> Since the cases do not generally attempt an analysis of the law to be applied,<sup>242</sup> it is often unclear whether the laws actually differ. For purposes of this discussion, then, a conflict of laws will be hypothesized in the fact patterns of several cases so that the effects of the varying results may be more easily seen.

#### A. *Analysis of Governmental Interests*

There are five significant factors to be considered in an analysis of governmental interests in the context of choice of forum/choice of law. These are: 1) The domicile, nationality, residence, or principal place of business of the party initiating the action in the nonchosen forum (the plaintiff); 2) the domicile, nationality, residence, or principal place of business of the party attempting to persuade the court to dismiss the action pursuant to the express choice of court provision (the defendant); 3) the location(s) of the transaction, which could include the place(s) where negotiations occurred, the place of making, and the place(s) of performance; 4) the chosen forum; and 5) the forum where the action is initiated in contravention of the forum selection agreement.<sup>243</sup>

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<sup>240</sup> *Id.* at 303-04, 314-15.

<sup>241</sup> That the approach taken in this paper is based on a policy-centered methodology does not mean that the basic issue cannot be assayed in a different manner. The policy-centered methodology is used because I am more familiar with it, and because *in my opinion* it is the most effective choice of law method. It cannot be denied, however, that an appraisal of the relevant and significant factors can be effected by other approaches. See, e.g., 2 A. EHRENZWEIG, *CONFLICT OF LAWS* 467-90 (1962); and R. WEINTRAUB, *supra* note 18, at 292, for an approach to choice of law contracts based upon a validation rule (although admittedly still grounded in a policy-centered approach).

<sup>242</sup> See note 231, *supra*.

<sup>243</sup> The first four factors are variations on those identified by Professor Currie in his discussion of the interest analysis approach in choice of law-contracts. B. CURRIE, *supra* note 238, at 82-83. The fifth factor is significant only in the choice of forum situation.

With these factors in mind, we may attempt to categorize the cases according to the differing ways these factors actually occur. It should be remembered that the nonchosen forum is almost invariably either the domicile, residence, state of nationality, or principal place of business of the plaintiff.<sup>244</sup> On the surface at least, if application of its law would be beneficial to the plaintiff, the court may see an interest in insuring it is applied.<sup>245</sup>

The most common fact patterns in choice of forum cases are those in which the plaintiff is from State A, the defendant is from State B, the transaction has contacts (*i.e.*, place of negotiation, place of contracting, place of performance) with both A and B, the selected forum is State B, and the plaintiff chooses to litigate in State A in contravention of the forum stipulation in the contract.<sup>246</sup> *Carbon Black Export, Inc., v. The S.S. Monrosa*,<sup>247</sup> is a good example. There the plaintiff was an American corporation,<sup>248</sup> presumably with its principal place of business in the United States.<sup>249</sup> The defendants were an Italian ship, the *S.S. Monrosa*, (since the case was an *in rem*, or libel action), and Navigazione Alta Italia, an Italian business concern which was the libel respondent and owner of the ship.<sup>250</sup> The bills of lading for transport of 30,000 bags of carbon black were executed in Houston, the port where the cargo was loaded and from which it was shipped, and the points of destin-

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<sup>244</sup> See note 236, *supra*.

<sup>245</sup> Cf. Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L.J. 8, 47-48, 62, 85, 100, where the author indicates that where the *state of primary reference* (which "would seemingly have an interest in having its law applied to the issue in question" (emphasis added) is the forum, it will almost invariably apply its own law.

<sup>246</sup> *Furbie v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972); *Carbon Black Export v. The S.S. Monrosa*, 254 F. 2d 297 (5th Cir. 1958); *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1 (S.D.N.Y. 1974); *Brown v. Gingiss Int'l, Inc.*, 360 F. Supp. 1042 (E.D. Wis. 1973); *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848 (D. Hawaii 1968); *Beirut Universal Bank v. Superior Court*, 74 Cal. Rptr. 333 (1969).

<sup>247</sup> 254 F.2d 297 (5th Cir. 1958). See text accompanying notes 81-84, *supra*.

<sup>248</sup> The court used the term "American citizen." *Id.* at 298.

<sup>249</sup> It is often necessary to "presume" factors thought significant to this analysis because the courts generally fail to consider the issue of choice of law at all and many such factors are not evident in the opinion.

<sup>250</sup> 254 F. 2d at 298, n. 4.

ation were three ports in Italy.<sup>251</sup> The transaction, then, had contacts with both the United States and Italy. The bills of lading provided for exclusive jurisdiction in the courts of Genoa, Italy for any actions for damages due to nondelivery or injury to the goods.<sup>252</sup> The plaintiff, ignoring the forum selection provision, brought the libel action for damages in the Federal District Court for the Southern District of Texas, the forum in which the contracts were executed and in which the agreements were partially performed.

In *Carbon Black*, the Fifth Circuit reversed the district court's decision to decline jurisdiction pursuant to the choice of court provision on the traditional ground that forum selection agreements which purported to "oust" a court of jurisdiction were violative of public policy and thus ineffective.<sup>253</sup> This decision, and especially the outmoded reasoning, has been criticized above.<sup>254</sup> Unfortunately, the *Carbon Black* court did not consider the effect that the law which would be applied by the chosen court would have in this situation, although such a consideration would have been a way to rationalize the result, and is now perhaps the only way since the United States Supreme Court in *Zapata* rejected the traditional judicial hostility to forum selection agreements in international maritime contracts.<sup>255</sup>

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<sup>251</sup> *Id.* at 298.

<sup>252</sup> The forum stipulation clause read:

Clause 27—Also, that no legal proceedings may be brought against the captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there. *Id.* at 299.

<sup>253</sup> *Id.* at 300-01. See text accompanying note 59, *supra*. The Fifth Circuit also noted that the district court's decision was "buttressed by the doctrine of forum non conveniens", *id.* at 300, and disposed of this matter by implying that where the non-chosen forum is just as convenient as the chosen forum, the doctrine of forum non conveniens will not be applied to dismiss the action. *Id.* at 301, *citing* and *quoting* from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946). "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." 330 U.S. at 508. That is, the doctrine of forum non conveniens is inapposite unless the forum which the defendant seeks to have determine the cause is *more* convenient than the instant forum. See text accompanying note 84, *supra*.

<sup>254</sup> See text accompanying notes 81-84, *supra*.

<sup>255</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See text accompanying notes 131-57, *supra*.



To illustrate this, let us interject a conflict of laws into the *Carbon Black* situation.<sup>256</sup> Suppose that the chosen forum in Genoa, Italy would choose to apply its own law in this situation,<sup>257</sup> and further suppose that the law to be applied would insulate the defendant from liability unless the plaintiff could prove willful and wanton negligence. Suppose that the American rule is that the plaintiff can recover on a showing of mere negligence and further that the plaintiff cannot prove the greater degree of negligence required by Italian law. Alternatively, the conflict might occur if the bills of lading had included a provision limiting the liability of the carrier, and the Italian court would have given effect to such limitation, although the American rule is that such limitations are invalid.<sup>258</sup> In either case, this presents the classic "true conflict" situation in terms of interest analysis,<sup>259</sup> in which each state involved has an interest in having its law applied on the issue in question. Here Italy's policy would be to protect carriers from liability due to mere negligence or from excessive liability resulting from damaged cargo, favoring them in this regard over shippers who are somehow injured by their negligence. The United States' policy, on the other hand, is to favor those who are damaged by a carrier's negligence, either by allowing recovery on proof of mere negligence, or by prohibiting liability limiting provisions in shipping contracts—more broadly stated, the policy is to allow those injured by the negligent acts of another to recover their losses from the culpable party. In this situation, each state has a legitimate interest in applying its law to the

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<sup>256</sup> The phrase "conflict of laws" is used here in the sense that the content of the laws of two interested states differ and that the result "were the case heard in the courts of the state whose law is sought to be used as a model, would be different than the result that would be reached under the substantive law of the forum." Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27, 95 (1967).

<sup>257</sup> In fact, it appears that the bills of lading contained an express choice of law provision, designating the law of the steamer and the Italian Commercial Code as the governing law. 254 F.2d at 299, n. 4.

<sup>258</sup> The Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (8) (1970) provides: Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

<sup>259</sup> See generally B. CURRIE, *supra* note 238, at ch. 2.

issue in question in order to advance the policy which underlies its law. Italy has an interest in protecting Italian carriers from excessive liability, and the United States has an interest in allowing Americans who have been injured by the negligence of another to be compensated.

Thus, had either of our hypothetical fact situations been real, the Fifth Circuit would have been on solid theoretical ground in refusing to recognize and give effect to the choice of forum provision. By exercising its discretion and declining to entertain the cause, the court would have been conceding application of Italian law on an issue over which the forum had a strong governmental interest. Professor Currie would say that in the case of a true conflict the forum court should apply forum law.<sup>260</sup> This is functionally the same as the forum favoring application of its law in this situation because to allow application of the law of Italy would be contrary to a strong public policy of the forum.<sup>261</sup> Regardless of which justification the court chooses, either is a rational basis to refuse to dismiss the action because of the forum selection agreement and makes a choice of forum provision "unreasonable" in the eyes of the nonchosen forum. Either is also proper even in the face of an express choice of law.<sup>262</sup>

The *Carbon Black* court, of course, did not consider the ramifications of choice of forum on choice of law. Instead, the court used an irrational reason, that forum selection agreements violate public policy and should not be enforced, to reach a rational (in the hypothetical case) result—the refusal to dismiss pursuant to the choice of court and presumably the

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<sup>260</sup> *Id.* at 181-84. This is because Professor Currie felt that a court was not in a position to "weigh" opposing interests when an interest of the forum is involved; that such balancing of interests is not a judicial, but rather a legislative, function; and that the only rational decision a court could make in such a situation, therefore, would be to apply the law of the forum. *Id.*

<sup>261</sup> See text accompanying notes 215 & 233, *supra*. Note, however, that this is conceptually different from what is called the "public policy technique," which has been characterized as the refusal of the forum to apply the foreign substantive law which its choice of law rule dictates on the ground that it is against the public policy of the forum. Sedler, *supra* note 245, at 51. For examples of the public policy technique, see *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1963); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 58-61 (1971); H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 14-15 (1964).

<sup>262</sup> See Sedler, *supra* note 190 at 294-98.

application of forum law—although some commentators might apply Italian law in at least one of the hypothesized situations.<sup>263</sup> Whether forum law is ultimately applied, however, is not as important as whether important forum interests are considered. The court might conclude that the forum interest is not substantial, or if it is substantial, that it should be subordinated. The important thing is that a strong public policy of the forum evidenced in its law has been considered on its own merits and not lost in the shuffle of merely giving effect or failing to give effect to the forum selection agreement of the parties.

A second fact pattern appearing in choice of forum cases is that in which the plaintiff is from State A, the defendant from State B, the transaction has contacts with both A and B, the plaintiff chooses to litigate in his home state in contravention of the forum selection, and the selected forum is State C, which has no factual contacts with the transaction other than being the chosen forum.<sup>264</sup> Our vehicle for analysis here will be *The Bremen v. Zapata Off-Shore Company*,<sup>265</sup> the facts of which have been discussed extensively above.<sup>266</sup> Briefly, the plaintiff American corporation contracted with a German corporation owning The Bremen to transport plaintiff's drilling rig from Louisiana to the Adriatic Sea, off the coast of Italy through a written contract which included an exculpatory clause and a forum selection provision providing that all disputes under the agreement would be brought before the Court of Justice in London, England.<sup>267</sup> The plaintiff brought a libel action in the federal district court in Tampa, Florida, contrary to the forum stipulation in the contract, after the rig had been damaged during a storm in the Gulf of Mexico. Both the dis-

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<sup>263</sup> For example, the validation principle might uphold the application of Italian law on the validity of the exculpatory provision, 2 A. EHRENZWEIG, *CONFLICT OF LAWS* 467-90 (1962); R. WEINTRAUB, *supra* note 18, at 292; or Italian law could be chosen as the law of the state of the most significant relationship, *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 188 (1971).

<sup>264</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966); *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (Pa. 1965).

<sup>265</sup> 407 U.S. 1 (1972).

<sup>266</sup> See text accompanying notes 131-57, *supra*.

<sup>267</sup> 407 U.S. at 2-3.

strict court<sup>268</sup> and the Fifth Circuit Court of Appeals<sup>269</sup> refused to give effect to the forum selection agreement. The Supreme Court reversed, holding that the lower court should generally uphold choice of forum clauses, and that such agreements are "prima facie valid" absent a showing of unreasonableness.<sup>270</sup>

Again, there was little consideration of the law which would be applied by the selected forum. Only Justice Douglas in dissent noted that "there is evidence in the present record that [the exculpatory provision] is enforceable in England [the chosen forum]."<sup>271</sup> If this is so, we need not hypothesize a conflict of laws here; a real conflict exists because of the American doctrine that liability exculpating provisions in maritime towage contracts are unenforceable.<sup>272</sup> But, this follows only if we may assume that the English forum would have applied English law—a not unreasonable assumption considering the English inclination to imply choice of law from choice of forum as the "proper law" of the contract.<sup>273</sup> There is no indication in the reports as to the law of Germany, the other interested state as the place of incorporation of the defendant, on the exculpatory provision. If it is consonant with the American rule, application of the contrary English rule by the chosen court is all the more objectionable. This would present a situation where there was no conflict between the substantive law of the interested states. But even if German law would recognize such an exculpatory provision, it is at least conceivable that its application would nonetheless be contrary to a strong governmental interest, or, if you will, public policy, of the United States as the forum state.

In this precise situation, however, it is arguable whether the policy behind the American rule would be advanced by application of American law, or subverted by application of a contrary rule. The policy reasons supporting the so-called *Bisso* doctrine of invalidity of exculpatory provisions in towage contracts were identified in the case announcing the rule as:

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<sup>268</sup> 296 F. Supp. 733 (M.D. Fla. 1969).

<sup>269</sup> 428 F.2d 888 (5th Cir. 1970), *aff'd en banc* 446 F.2d 907 (5th Cir. 1971).

<sup>270</sup> 407 U.S. at 10.

<sup>271</sup> *Id.* at 23.

<sup>272</sup> *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

<sup>273</sup> See note 235, *supra*.

- (1) to discourage negligence by making wrongdoers pay damages; and
- (2) to protect those in need of goods or services from being overreached by others who have the power to drive hard bargains.<sup>274</sup>

Although not approaching the issue from the same perspective as this article, Chief Justice Burger in the majority opinion in *Zapata* made it clear that he did not believe that the United States had a governmental interest, in light of the policies underlying the rule, in having its law applied on the issue of the enforceability of the exculpatory provision. The Chief Justice wrote that there was no American interest in discouraging negligence which did not occur inside our territorial waters, and there was no interest in protecting an American consumer who bargained for a supplier's services in an arms-length transaction.<sup>275</sup> Thus, if this analysis is accepted, there is no governmental interest to be advanced by application of the *Bisso* doctrine or subverted by application of a contrary rule—or, as the Chief Justice put it, it is not contrary to a strong public policy of the United States.<sup>276</sup>

However, Mr. Justice Douglas, in his dissent, did find that the United States had an interest in applying its law on the issue of the validity of the exculpatory clause. He reached this result by citation to cases indicating that the law to be applied to torts occurring in international waters is a general maritime law *as interpreted by the forum*.<sup>277</sup> This is consonant with reasoning that the policy of discouraging negligence exists wherever the negligent act occurs, especially when the injured party is an American corporation and the transaction had other significant factual contacts with the forum. If this reasoning is accepted, there is definitely an interest in the United States which would be impaired by the application of a contrary rule and which would be advanced by application of the *Bisso* doctrine. Again, Germany may have had an interest in applying

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<sup>274</sup> *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 91 (1955), *citing* cases collected in Annot., 175 A.L.R. 8 (1948).

<sup>275</sup> 407 U.S. at 15-16.

<sup>276</sup> *Id.*

<sup>277</sup> *The Belgenland*, 114 U.S. 355 (1885); *The Scotland*, 105 U.S. 24 (1881); *The Gylfe v. The Trujillo*, 209 F.2d 386 (2d Cir. 1954).

its law to this situation depending on the content of that law. At most a true conflict would be presented if the German rule is to uphold exculpatory clauses, because Germany would have an interest in applying its rule to protect a German defendant. If the German rule were consistent with the *Bisso* doctrine, there would be no conflict of laws among the interested states. In either situation, the application of American law to invalidate the exculpatory provision would be defensible.<sup>278</sup>

In *Zapata*, the Court at least considered the policies and interests involved in the choice of law, even if not directly concerning itself with the law which would have been applied by the chosen forum. The policies and interests were at least recognized and evaluated. But a more thorough examination of the effect of choice of forum on choice of law, as advocated herein, would have forced the court to face the issue more squarely and would have been preferable. Moreover, a determination of the issues in that light could well have changed the result.<sup>279</sup>

*Copperweld Steel Co. v. Demag-Mannesman-Boehler*<sup>280</sup> is a *Carbon Black* type case with a twist. The plaintiff was from Pennsylvania, and the defendants were German corporations. There is no indication where the negotiations for the contract occurred, or where it was finally agreed to, nor were there any factual contacts of the transaction to Pennsylvania other than that it was the plaintiff's state of incorporation. The district court, however, found that the defendants were doing business in Pennsylvania and were thus subject to service of process there.<sup>281</sup> The contract was for the construction of a plant on the plaintiff's property in Ohio. The court in *Copperweld Steel* refused to effectuate the choice of forum provision in the contract designating German courts, holding that it was unreasonable in this situation.<sup>282</sup>

In *Copperweld* the choice of law analysis is complicated

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<sup>278</sup> See notes 267-68, *supra*.

<sup>279</sup> See discussion of fairness, subsection VIII B, *infra*.

<sup>280</sup> 54 F.R.D. 539 (W.D. Pa. 1972). See text accompanying notes 184-86, *supra*.

<sup>281</sup> *Id.* at 541, pursuant to PA. STAT. tit. 15, § 2011 (1971 Supp.) (repealed in 1972), applicable through FED. R. CIV. P. 4(e).

<sup>282</sup> 54 F.R.D. at 542, *citing*, for the reasonableness test, *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3d Cir. 1966); *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810 (Pa. 1965). See text accompanying note 186, *supra*.

from the outset because the domestic laws of the forum to be applied by the federal district court<sup>283</sup> probably could not be applied constitutionally since there were no factual contacts with that jurisdiction arising out of the transaction.<sup>284</sup> Again there is no indication whether the law of any of the interested jurisdictions differed in any respect. Since the issue was whether the plant as constructed performed in the agreed-upon manner, an apparent factual dispute, it is difficult to conceive of a conflict of laws unless under German law a limitation of liability would have been applied. Suppose that such was in fact the case. Again, if the chosen court would apply its own law and limit liability, a true conflict would be presented. Germany would have an interest in applying its law to protect a German corporation by limiting its liability in this type of situation, and Ohio would have an interest in seeing that those injured by improper construction on Ohio real property are compensated for their damages. But here the Pennsylvania federal district court would be cast in the role of a disinterested forum. In the true conflict situation, the court could make a choice of law on the basis of "most significant contacts" approach of the Restatement<sup>285</sup> which, in this situation would likely be Ohio law.<sup>286</sup> Professor Currie would have the court of the disinterested third state either dismiss on forum non conveniens grounds, or if this is not feasible, apply the law most similar to its own.<sup>287</sup> Conceivably the court could act as a super-legislature and "weigh" the conflicting interests. The method really does not matter so long as the interests are recognized and considered in the judicial process.

The same type of analysis may be applied to choice of forum cases involving a "false conflict" in terms of interest analysis—cases in which only one state has an interest in

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<sup>283</sup> See *Pennsylvania law under Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

<sup>284</sup> *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See the discussion in Subsection VII B, *infra*.

<sup>285</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

<sup>286</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 (1971) provides that in a contract for the rendition of services—which would presumably include a construction contract—the place where the primary portion of the services are to be rendered is presumed to have the most significant relationship.

<sup>287</sup> B. CURRIE, *supra* note 238, at 120, n. 64.

applying its law on the issue in question. For instance, in *Calzavara v. Biehl & Co.*,<sup>288</sup> the plaintiff, a Louisiana resident, bought a ticket for passage on an Italian ship from the shipping company's agent, the defendant, a Louisiana corporation. The ticket was for transportation from New Orleans to Italy and included a provision expressly conferring exclusive jurisdiction for any dispute resolution on the courts of Venice, Italy.<sup>289</sup> When the plaintiff's passage was cancelled without apparent reason, he sued the defendant in Louisiana state court. The Louisiana court refused to uphold the forum selection agreement on the grounds of unreasonableness, since to do so would have denied the plaintiff an effective remedy in that the Italian court could not exercise "effective" jurisdiction in this instance.<sup>290</sup>

This decision was undoubtedly correct, but it becomes even more defensible if one hypothesizes a conflict of laws into the facts and assumes that the Italian court could get effective jurisdiction. Suppose that under Italian law there is no right of action for breach of contract of carriage by denial of entry onto a vessel, and suppose that the Louisiana rule is contrary. Italy's policy would be to protect the assets of Italian carriers from suits for mere denial of passage, presuming that the financial situation of the carrier is more important than the disrupted plans of the traveller. Louisiana's policy, on the other hand, is to allow those injured by an arbitrary breach of contract to be compensated. Here Italy would have no interest in applying its law to a situation involving a Louisiana defendant—to do so would not advance the policy at all—nor would application of Louisiana law undermine the policy since the Italian carrier is not the defendant. On the contrary, Louisiana has an interest in allowing its plaintiff to recover and is the only state with an interest in applying its law to our hypothetical situation. Of course, the chosen Italian court might itself choose to apply Louisiana law, but absent a showing that it would the Louisiana court would be justified in determining the forum selection provision unreasonable on the sole ground

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<sup>288</sup> 181 So. 2d 809 (La. App. 1966). See text accompanying notes 192-93, *supra*.

<sup>289</sup> *Id.* at 810.

<sup>290</sup> *Id.* at 810-11.



that only Louisiana had an interest in applying its law.<sup>291</sup>

It is fairly clear that the law to be applied by the chosen forum can have significant consequences for the parties. The application of such law can often encroach against significant forum interests and thus render the choice of forum clause unreasonable and unenforceable. In determining whether to uphold a choice of forum, the nonchosen court should give careful consideration to policies and interests underlying any potentially conflicting laws to ensure that the proper law is applied to the transaction as a part of the reasonableness test.

### B. *Fairness to the Parties*

In cases involving consensual transactions, courts must generally consider the likelihood that the parties have relied upon the law of a specific state. Thus, it would be "unfair" to apply a law to the transaction which was unanticipated or unforeseeable by the parties.<sup>292</sup> In the choice of forum situation, however, it may be argued that the choice of law of the chosen forum is never unforeseeable. In the freely negotiated agreement, the parties must be presumed to know the choice of law rules of the chosen forum, and one may fairly imply the parties' consent to the employment of its choice of law rules. If this is the only component of the concept of fairness to the parties, any choice of law by the chosen forum pursuant to its articulated choice of law rules would be foreseeable and fair.

However, there is another important element in determining fundamental fairness to the parties. This is the concept of legislative jurisdiction, embodied in the rule that a state denies due process of law<sup>293</sup> to a party by applying its law where it has

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<sup>291</sup> For another example of a "false conflict" type case, see *Roach v. Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Calif. 1973), where the controversy was between a third-party plaintiff and a third-party defendant both of whom were from the same state, which was also the chosen forum, where the agreement was entered, where the contract was performed, and where the alleged breach occurred. Professor Currie would say that it would constitute a denial of due process for a court with no interest in the matter in issue to apply its law in determination of that issue. See text accompanying note 295, *infra*.

<sup>292</sup> Sedler, *supra* note 190 at 306; citing as an example *Denny v. American Tobacco Co.*, 308 F. Supp. 219 (N.D. Cal. 1970).

<sup>293</sup> U.S. CONST. amend. XIV.

no factual contacts with the transaction<sup>294</sup> or "no legitimate interest in the application of its policy to the case at hand."<sup>295</sup> This could easily arise in a case such as *Zapata*,<sup>296</sup> where the chosen forum, England, had no factual contacts with the transaction and seemingly no interest in applying its law to the transaction. It has already been noted that the British rule could very well be that a choice of law is implied from a choice of forum.<sup>297</sup> Would the potential application of English law to a transaction with which it had no contacts besides being the chosen forum be so unfair as to violate the due process rights of the party resisting the effectuation of the choice of forum provision so as to render the entire choice unreasonable and thus unenforceable? The Restatement seems to give an affirmative answer, although not one of constitutional dimension, by its requirement that the state whose law is chosen by the parties must have a reasonable relationship to the transaction.<sup>298</sup>

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<sup>294</sup> *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See Felix, *Diversity Jurisdiction and Choice of Law: Of Strangers Bearing Stale Products Liability Claims*, 25 S.CAR.L. REV. 199, 210 (1973). Cf. *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277 (P.C.), where Lord Wright, writing for the Judicial Committee of the English Privy Council, in a case where all the parties had expressly chosen English law to govern their contract even though the transaction had no factual contacts with England, wrote that "[c]onnection with English law is not as a matter of principle essential." *Id.* at 290.

<sup>295</sup> B. CURRIE, *supra* note 238, at 195. Professor Currie exhaustively discusses the constitutionality of choice of law in ch. 2. The converse of the rule is that an interested forum may constitutionally apply its law if such application is "fair" (read foreseeable) to the other party. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); B. CURRIE, *supra* note 238, at ch. 2; Sedler, *supra* note 190, at 294; Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 403 (1971). The problem of a completely disinterested forum can arise because of the concept of "transient jurisdiction," Ehrenzweig, *supra* note 6, at 289, or of consent to the jurisdiction of a completely unconnected forum, see text accompanying notes 264-79, *supra*. Although "[h]istorically and analytically judicial jurisdiction and choice of law are separable [and] [a]ccording to traditional doctrine the decision to hear a case or not is unaffected by the choice of law to be applied in disposing of the case," Felix, *supra* note 294, at 207, there have been many calls to consolidate the two concepts, e.g., Ehrenzweig, *supra* note 6, at 292; Traynor, *supra* note 3, at 663-64 (1959), both favored tightening the laws of judicial jurisdiction to conform with current legislative jurisdiction notions. Cf. note 325, *infra*.

<sup>296</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>297</sup> See notes 137 and 235, *supra*.

<sup>298</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187 (2)(a) (1971). The comment to this subsection seems to believe this interpretation, however, when it notes that:

The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example,

In the absence of an express choice it is clear that a state with no factual contacts or interest in applying its law could not be the state of "the most significant relationship to the transaction and the parties."<sup>299</sup>

The question could be entirely academic for it actually assumes that the chosen forum will apply its law or the law of a similarly situated state<sup>300</sup> notwithstanding a lack of contacts or interest and that it will ignore the contacts with and interests of other states. However, not all choice of law rules are rational in that often the policies of interested states are ignored and the law of a completely noninterested state is applied to the issue in question.<sup>301</sup> Again, it is an issue to which attention should be given by any nonchosen court when it is asked to uphold a forum selection agreement and dismiss an action. The nonchosen forum faced with this problem would have to *predict* what law the forum chosen by the parties would apply. If the chosen forum would give due consideration to the interests of the states involved and not apply its own law in the absence of any interest in doing so, this would no longer be a viable issue. But if the nonchosen forum's prediction is that

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when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed. For only in this way can they be sure of knowing accurately the extent of their rights and duties under the contract. So parties to a contract for the transportation of goods by sea between two countries with relatively undeveloped legal systems should be permitted to submit their contract to some well-known and highly elaborated commercial law. *Id.* at Comment f [emphasis added].

As indicated by the emphasized portion, this rule still appears to restrict choice of the law of a state with no substantial relationship to the situation where the states which do have a substantial relationship have comparatively primitive legal systems which are unfamiliar to the parties. The case cited in the Reporter's Note, however, *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277 (P.C.), allowed a choice of English law in a carriage of goods contract between Newfoundland and New York, neither of whose legal systems could fairly be characterized as "relatively undeveloped." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187, (Reporter's Notes) (1971). See also UNIFORM COMMERCIAL CODE §1-105, restricting express choice of law to jurisdictions having a "reasonable relation" to the transaction.

<sup>299</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

<sup>300</sup> "A state may deprive a party due process of law by applying the law of a state having no interest in the matter, whether the law applied is that of the forum of another state." B. CURRIE, *supra* note 238, at 196 n. 295; citing *Young v. Masci*, 289 U.S. 253 (1933). But cf. EHRENZWEIG, at 12.

<sup>301</sup> See, e.g., the discussion of the *lex loci delicti* rule in R. WEINTRAUB, *supra* note 18, at 210-19 and cases cited therein.

significant interests of connected states will be ignored or that the chosen forum would apply its own law notwithstanding the lack of an interest in doing so (besides the fact that it was the forum chosen by the parties), the court must consider whether it would be fair, or indeed constitutionally permissible, to allow the chosen forum to do so by giving effect to the forum stipulation. That is, it is necessary for the nonchosen court to determine both that the chosen forum would apply the law of a state without significant factual contacts or interest in applying its law to the question at issue, and that such future or potential action by the chosen court in choosing to apply what the nonchosen court views as the wrong law renders the entire choice of forum unreasonable.

There are three cases which are especially instructive in any analysis of this issue. The first is the classic case of *Home Ins. Co. v. Dick*,<sup>302</sup> in which a Mexican insurance company issued an insurance policy in Mexico to a Mexican resident covering damages to a certain ship so long as they occurred in Mexican waters and providing that any losses were payable in Mexico City.<sup>303</sup> The policy included a clause which prohibited actions under the policy brought more than a year after the incident causing the damage. Before the loss occurred, the policy was assigned to Dick, a Mexican resident, who was nevertheless a Texas domiciliary. The limitation provision was valid under Mexican law, but the Texas court in which Dick sued the insurer held that the provision was rendered inoperative by a Texas statute.<sup>304</sup> The Supreme Court reversed, holding that

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<sup>302</sup> 281 U.S. 397 (1930). See the discussion in B. CURRIE, *supra* note 238, at 232-33.

<sup>303</sup> 281 U.S. at 403-04.

<sup>304</sup> *Id.* at 404-05. The statute, TEX. REV. CIV. STAT. art. 5545 (1925) reads:

No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years.

And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this state.

It is interesting to note how the action was maintained in Texas despite the fact that the defendant had never done any business, and was not present, in Texas. Two New York companies had reinsured part of the risk assumed by the defendant, Home Insurance. The reinsurers were sued as garnishees on the theory that, if the claim was established, they were indebted to Home Insurance, and it was these debts that were attached in the quasi-in rem proceeding. The local agents of the garnishees were served pursuant to Texas law. 281 U.S. at 402.

application of the Texas law to a transaction with which Texas had no factual contacts violated due process.<sup>305</sup> As Professor Currie said, "when a state having no interest in the matter applies its law to the exclusion of the proffered law of an interested foreign state, due process is denied."<sup>306</sup>

Another Supreme Court decision, decided prior to *Dick*, also illuminates the legislative jurisdiction-due process aspect of the fairness test. In *New York Life Ins. Co. v. Head*,<sup>307</sup> the Supreme Court held that application of Missouri law to an insurance contract made in Missouri between parties from New Mexico and New York violated due process.<sup>308</sup> The Court acknowledged the power of Missouri to govern aspects of the contract related to its making,<sup>309</sup> but refused to allow Missouri law to govern on issues having nothing to do with the making of the contract and which concerned only the subsequent contractual relationship of the parties. Here the issue was whether the Missouri law prohibiting forfeiture of insurance policies due to default in repayment of loans obtained from the insurer under the policy provisions could constitutionally be applied although the original insurance contract had been entered into in Missouri, the subsequent loan transaction had been accomplished elsewhere, and the parties were residents of other states. The Court, then, recognized that merely because a con-

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<sup>305</sup> 281 U.S. at 407-08.

<sup>306</sup> B. CURRIE, *supra* note 238, at 232. Professor Currie uses the term "interest" in the sense of advancement of a policy underlying a rule of the state by its application, or a subversion of such a policy by application of the law of another state. *See generally, id.*, chs. 2 & 4.

<sup>307</sup> 234 U.S. 149 (1914). *See* the discussion in B. CURRIE, *supra* note 238, at 225-29.

<sup>308</sup> 234 U.S. at 161-62. The Court said that "[t]he principle . . . lies at the foundation of the full faith and credit clause . . ." *id.* at 161, but spoke in the language of due process [*e.g.*, "how far it was within the power of the State of Missouri to extend its authority into the State of New York . . ." 234 U.S. at 161], and cited *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), for the proposition that "a State may not consistently with the due process clause of the fourteenth amendment, extend its authority beyond its legitimate jurisdiction . . ." 234 U.S. at 162. Professor Currie has contended that, in this area at least, the distinction between the two is meaningless "because the essential principle underlying the operation of both clauses is the same . . ." B. CURRIE, *supra* note 238, at 195. He also says that the Court "equated" due process and full faith and credit in *New York Life Ins. Co. v. Head*. *Id.* at 226.

<sup>309</sup> 234 U.S. at 160. Note, however, that the insurance contract specifically provided that it was issued in New York and should be dealt with as a New York contract. *Id.* at 155-56.

tract was made in a particular jurisdiction,<sup>310</sup> this does not give that jurisdiction the power, in the due process sense, to govern subsequent transactions under the contract which have no relationship to the place of making.<sup>311</sup> In Professor Currie's words, Missouri could not constitutionally apply its law on the issue of whether there had been a forfeiture "since neither the insured nor the beneficiary was a resident of Missouri, [and] that state had no interest in the application of its nonforfeiture policy."<sup>312</sup>

Finally, in *John Hancock Mutual Life Ins. Co. v. Yates*,<sup>313</sup> another life insurance contract case, everything significant happened in New York—the policy was applied for, issued and delivered there, the insured and beneficiary were New York residents when the policy became effective and when the insured died there. The action was brought in Georgia, however, after the widow moved there following the insured's death.<sup>314</sup> The insurer defended in the Georgia action by proving that the insured had made material misrepresentations in the policy

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<sup>310</sup> An occurrence that some would undoubtedly characterize as "fortuitous."

<sup>311</sup> The Court's precise language in framing the general issue is instructive: . . . the power of the State of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other States, so as in such other States to destroy or impair the right of persons not citizens of Missouri to contract, although the contract could in no sense be operative in Missouri and although the contract was sanctioned by the law of the State where made. That is to say, the right of a State where a contract concerning a particular subject matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the state in the future concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made. In other words . . . , we must consider the validity of the loan agreement, that is, how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri.

<sup>312</sup> 234 U.S. at 160-61.

<sup>313</sup> B. CURRIE, *supra* note 238, at 226.

<sup>314</sup> 299 U.S. 178 (1936). See the discussion in B. CURRIE, *supra* note 238, at 235-36.

<sup>315</sup> 299 U.S. at 179.

application, which under New York law rendered the policy completely ineffective. The Georgia court, however, applied the Georgia rule permitting the jury to determine whether the misrepresentations were material and whether the agent's knowledge of the misrepresentations would be imputed to the company so that it would be held to have waived them.<sup>315</sup> The state court had supported this application of Georgia law by reasoning that the issue of materiality was only a question of the remedy rather than the validity of the contract and held the law of the forum could be applied.<sup>316</sup> The Supreme Court dismissed the remedy rationale quickly by noting that the defense involved "a substantive right conferred by a statute of New York,"<sup>317</sup> and held that Georgia's failure to recognize this substantive defense denied full faith and credit to the laws of a sister state.<sup>318</sup> Professor Currie cites *Yates* as illustrative of the rule that a state may not constitutionally apply its law on a matter over which it has no interest,<sup>319</sup> and the court in *Yates* cited *Dick* for the proposition that "there was no occurrence, nothing done, to which the law of Georgia could apply."<sup>320</sup>

It is fairly clear, then, that if in the *Zapata* situation the chosen forum applied a law of a state which had neither significant factual contacts with the transaction nor an interest in having its law applied on the matter in issue, due process would be denied. Note once again that in order for this to affect the nonchosen court which is asked to dismiss pursuant to a choice of forum agreement, that court must believe that the potentiality that the chosen forum will apply the improper law in the due process sense renders the choice of forum unreasonable.

What should a nonchosen court do, then, when faced with

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<sup>315</sup> *Id.* at 179-80.

<sup>316</sup> *Id.* at 181-82.

<sup>317</sup> *Id.* at 182.

<sup>318</sup> *Id.* at 183. Presumably, the Georgia court should have directed a verdict for the insurance company.

<sup>319</sup> B. CURRIE, *supra* note 238, at 236:

It is manifest that Georgia had no interest in the application to this case of any policy to be found in its laws. When the contract was entered into, and at all times until the insured died, the parties and the transaction were beyond the legitimate reach of whatever policy Georgia may have had.

<sup>320</sup> 234 U.S. at 182. This language, and the citation of *Dick*, buttresses Professor Currie's contention that the two constitutional provisions, full faith and credit and due process, are coterminous in this context. See note 308, *supra*.

the *Zapata* situation in which it is reasonably sure that the chosen forum would apply its own law even though it had neither factual contacts with the transaction nor any apparent interest in applying its law on the relevant issue save that it was the forum chosen by the parties? This could be reduced to an inquiry into whether the mere choice of forum by the parties for their transaction is a sufficient factual contact or gives it an interest in applying its law on the point in question. There is no direct authority either way in answer to this question,<sup>321</sup> but *Dick*,<sup>322</sup> *Head*,<sup>323</sup> and *Yates*<sup>324</sup> all seem to indicate that *judicial jurisdiction* to decide a cause does not concomitantly bestow *legislative jurisdiction* for the state to apply its law to an issue with which it has no contacts or interest.<sup>325</sup> What more does a choice of forum provision do to the chosen forum than submit to its judicial jurisdiction; what other effect does it have besides prorogation?<sup>326</sup> It should add no factual contacts, and certainly does not constitute a sufficient contact in the constitutional sense. A fortiori, the forum qua forum would have no interest in applying its law to an issue simply because it has been designated by the parties as the exclusive forum. Only when the rule of law sought to be applied concerns a strong forum policy in procedural matters or would hinder judicial administration should the forum qua forum have a legitimate interest in applying its law to a matter with which it has no factual connection.<sup>327</sup> Furthermore, if the fact that a contract

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<sup>321</sup> But see *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277 (P.C.), discussed in note 294, *supra*.

<sup>322</sup> *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

<sup>323</sup> *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914).

<sup>324</sup> *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

<sup>325</sup> In this respect, the concepts of judicial jurisdiction and legislative jurisdiction—or the ability of a state to apply its law to an issue—are completely separable. Cf. note 48, *supra*, which is the converse of this proposition in that the commentators there proposed restricting judicial jurisdiction to coincide with current notions of legislative jurisdiction, whereas if one accepted the argument that the mere fact of judicial jurisdiction simultaneously conferred legislative jurisdiction, one would be forced to concede a great expansion in the current concepts of legislative jurisdiction up to the limits of judicial jurisdiction.

<sup>326</sup> See the discussion of the prorogatory effect of a choice of court stipulation, text accompanying notes 11-17, *supra*.

<sup>327</sup> B. CURRIE, *supra* note 238, at 236; Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813, 822-23 (1962), which also discusses various rules which do give the forum qua forum an interest in applying its law because of the policies identified in the text.



was made within a state does not give the state sufficient contact or interest to apply its law on issues not concerning the making of the agreement,<sup>328</sup> merely being a designated forum, a relatively less significant contact, could not do so either.<sup>329</sup>

Perhaps we are taking the wrong approach. Conceivably in the narrow confines of the choice of forum problem there need not be a relationship between the law to be applied by the chosen forum and the transaction. It would certainly not be unfair in the sense of undue surprise as has been indicated above. May there not be an exception to the factual connection or interest requirement in the choice of forum context when extraordinary circumstances exist? The Restatement (Second) of the Conflict of Laws seems to carve out just such an exception in the situation of an express choice of law when the parties are unfamiliar with the laws of the connected states and the legal systems of the connected states are "relatively immature."<sup>330</sup> This exception, however, is too narrow, and the case cited by the Reporter's Note to support the proposition, *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*,<sup>331</sup> bears this out. In *Vita Food* the English Privy Council upheld an express choice of English law to govern a carriage of goods transaction between Newfoundland and New York, neither of which has a legal system that could fairly be characterized as "relatively undeveloped." Although the Restatement and *Vita Food* deal with an express choice of law, this is immaterial. The same considerations would apply in the absence of an express choice of law so long as there is an express choice of forum because of the presumption that the parties knew the choice of law rule of the chosen forum.<sup>332</sup>

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<sup>328</sup> *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161-62 (1914).

<sup>329</sup> *Cf. Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*, [1939] A.C. 277 (P.C.), discussed in note 294, *supra*.

<sup>330</sup> RESTATEMENT (SECOND) CONFLICT OF LAWS §187, Comment f, (1971). For text of the comment, see note 298, *supra*.

<sup>331</sup> [1939] A.C. 277 (P.C.). See also *Duskin v. Pennsylvania-Central Airlines Corp.*, 167 F. 2d 727 (6th Cir. 1948), *cert. denied* 335 U.S. 829 (1948); *Gantt v. Felipe Y. Carlos Hurtado & Cia., Ltda.*, 297 N.Y. 433, 79 N.E. 2d 815 (1948) (procedural characterization).

<sup>332</sup> Unless, of course, the chosen forum changed its choice of law rule after the contract was entered or in the case between the parties themselves, which would be unpredictable by the nonchosen court.

If there is such an exception, the question becomes what are the extraordinary circumstances which will bring the exception into play? Certainly, the Restatement hypothetical in which the connected states have law that is unfamiliar to the parties and comparatively primitive legal systems<sup>333</sup> would be sufficient. Is it not just as reasonable to extend the exception to situations in which there are several laws which could conceivably apply or where the parties desire a neutral forum *and* neutral law? It has been posited that "[n]eutrality of forum is a traditional admiralty doctrine in situations where litigants have no common nationality and their case involves maritime law,"<sup>334</sup> and the experience of certain courts, especially British courts, in admiralty matters is also well known so that these courts are often contractually designated to decide maritime matters.<sup>335</sup> There is no reason for these factors not to have equal force in nonmaritime situations. Perhaps the rule should be that whenever parties from different states enter into a contract which has contacts with two or more states, the state whose law is chosen to govern the transaction either by the parties or by the chosen forum in the absence of an express choice, should not be required to have a substantial connection with the transaction or a legitimate interest in applying its law provided that good reason exists to dispense with the requirement. Good reason would include such circumstances as: 1) Unfamiliarity by the parties of the laws of the connected states, 2) the undeveloped state of the legal systems of the connected states, 3) a particular need for a neutral forum, such as where several laws could apply and "none has a clear exclusive claim to control,"<sup>336</sup> or 4) a particular need for a forum with expertise in the type of transaction entered. Perhaps the exception should be limited to "international" contracts.<sup>337</sup> At any rate,

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<sup>333</sup> See note 330, *supra*.

<sup>334</sup> Comment, 6 N.Y.U. J. INT'L. L. & POL. 369, 375 (1973), *citing* *The Belgenland*, 114 U.S. 355 (1885).

<sup>335</sup> Comment, 6 N.Y.U. J. INT'L. L. & POL. 369, 375 (1973), *citing* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-12 (1972).

<sup>336</sup> Yntema, *supra* note 143, at 356-57.

<sup>337</sup> For the definition of an "international" contract, see note 1, *supra*. This would at least be consistent with Professor Ehrenzweig's desire to totally separate the treatment of international and interstate conflicts. See, e.g., Ehrenzweig, *Interstate and International Conflicts: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957);

these are merely guides, for any sort of circumstance which would indicate a need for certainty, neutrality, expertise, or the like, should suffice. Again, this seems to be a return to a variation of the "reasonableness" test.

There must be, however, some limitation of this exception; for example one limit might be provided by the adhesion contract consideration in the test for the reasonableness of the choice of forum provision.<sup>338</sup> However, the most significant danger would be when the parties attempted to evade obligatory requirements of the law of an interested or factually connected state—the concept of fraud on the law.<sup>339</sup> Again, however, this could be avoided through proper consideration by the nonchosen court of the law to be applied by the chosen forum and its consequent refusal to give effect to the forum selection provision where the chosen forum would apply a law which would subvert a legitimate policy of any interested state.<sup>340</sup> As Walter Wheeler Cook put it: "Unless those consequences were of a kind regarded as contrary to public policy as envisaged by the forum . . . it would seem that this type of agreement might be enforced."<sup>341</sup>

It should be clear, then, that under the exception promulgated in this paper, the court confronted with the *Zapata* situation—where it could predict that the chosen forum would apply the law of a state which had neither factual contacts nor a legitimate interest in applying its law on the matter in issue—could proceed and uphold the choice of forum where the necessary circumstances justifying the exception exist. *Zapata* would present no real problem given that the parties are from different states and given the need for neutrality and expertise in the forum. It will ultimately be up to the courts to establish the parameters of the exception. Again, however, the mere consideration of the relevant policies and interests involved insures a more just adjudication.

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EHRENZWEIG, at §6; cf. Scoles, *Interstate and International Distinctions in Conflicts of Laws in the United States*, 54 CALIF. L. REV. 1599, 1622 (1966).

<sup>338</sup> See text accompanying notes 161-69, *supra*.

<sup>339</sup> Yntema, *supra* note 143 at 354.

<sup>340</sup> See the discussion in subsection VIII D, *supra*.

<sup>341</sup> W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 411-12 (1942).

IX. POST *Zapata* CASES AND ANALYSIS OF THE RULE

In the brief time since *Zapata* was handed down, several other courts have had to consider and decide whether to give effect to choice of forum provisions. A brief look at these cases is instructive and does nothing to counter the contention that the reasonableness test approach is rapidly becoming the preferred position.

In *Furbee v. Vantage Press, Inc.*,<sup>342</sup> the plaintiff and defendant were author and publisher, respectively, and had entered into a contract for the publication and distribution of a book with a choice of forum clause designating New York state courts. In contravention of this agreement, the plaintiff sued in federal court alleging fraudulent inducement to make the contract. The basis of jurisdiction was diversity of citizenship; federal substantive law was not involved. The publisher defended under the choice of forum stipulation, and the district court dismissed pursuant to the forum limitation agreement. The District of Columbia Circuit affirmed the dismissal on appeal, indicating that the choice of forum would be upheld if reasonable.<sup>343</sup> The court determined the chosen forum was reasonable on several grounds, including: (1) That the parties had designated that New York law would govern regarding formation and construction, (2) that it was the parties' residence, (3) that New York was the place of execution and performance, and (4) that it was the location of both parties and most, if not all, witnesses.<sup>344</sup> Since New York had "substantial contacts" with the transaction, its designation as an exclusive forum was not unreasonable. Of course, the outcome might (and probably would) be different if federal substantive law had been involved since it would have given the forum *qua* forum more of an interest in deciding the issue.

*Roach v. Hapag-Lloyd, A.G.*,<sup>345</sup> was a federal district court case which also applied the *Zapata* reasonableness rule. Here, a longshoreman was injured when goods fell from a ship onto him. He sued the German corporate owners of the vessel, who

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<sup>342</sup> 464 F.2d 835 (D.C.Cir. 1972).

<sup>343</sup> *Id.* at 836.

<sup>344</sup> *Id.* at 837.

<sup>345</sup> 358 F. Supp. 481 (N.D. Calif. 1973).

in turn impleaded the packager of the goods, Peiver, a German corporation, as a third-party defendant.<sup>346</sup> Peiver defended on a choice of forum clause in the bill of lading which selected German courts and moved to dismiss the third-party complaint. Hapag argued that the situation was covered by the Carriage of Goods by Sea Act<sup>347</sup> and that *Indussa*<sup>348</sup> would therefore apply to void the choice of forum provision. The district court, however, refused to follow *Indussa* finding instead that the injury was not to the goods but rather to a person, and holding that the Carriage of Goods by Sea Act was therefore inapplicable.<sup>349</sup> The court then indicated that a choice of forum is prima facie valid unless unreasonable, and applied the reasonableness test, citing *Zapata*, determining that the choice of forum was not unreasonable in this instance. The court noted the substantial contacts of the transaction between owner and packager to Germany—both were German corporations, and the breach in packaging, if any, occurred in Germany—but said that it was a close case since all witnesses to the accident were in the United States. However, the court held that Hapag had not met its burden to “clearly show” that the clause would operate unjustly and unreasonably, and so it dismissed the third-party action.<sup>350</sup> The case could be explained by the observation that since the parties to the choice of forum agreement were both foreigners who had chosen the courts of their state of incorporation, the court’s protective instincts for its own citizens, a potent consideration in many of these cases, was absent. However, this interpretation is counter to explicit language in the opinion.

*Spatz v. Nascone*<sup>351</sup> considered the novel question of the extent to which the parties will be allowed to preclude exercise of jurisdiction by federal courts in favor of state courts through a choice of forum clause. In *Spatz*, the parties entered into a contract in which the defendant agreed to construct a shopping

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<sup>346</sup> For third-party implications, see *Matthiesson v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132 (D. Minn. 1968), discussed at notes 204-06, *supra*.

<sup>347</sup> 46 U.S.C. §§ 1300-15 (1970).

<sup>348</sup> *Indussa Corp. v. S.S. Ranborg*, 377 F. 2d 200 (2d Cir. 1967). See text accompanying notes 77-79, *supra*.

<sup>349</sup> 358 F. Supp. at 483-84.

<sup>350</sup> *Id.* at 484.

<sup>351</sup> 364 F. Supp. 967 (W.D. Pa. 1973).

center on land in New York and sell it to the plaintiff. The contract included a choice of forum provision designating Pennsylvania state courts and an express choice of law clause selecting Pennsylvania law. A dispute arose as to the tax liability on the property and plaintiff sued in Pennsylvania federal district court. Defendant moved for dismissal on the basis of the choice of forum agreement. The plaintiff countered by arguing that to deprive them of a forum in federal court would deprive them of "substantial constitutional and statutory rights."<sup>352</sup> The court, quoting extensively from *Zapata*, indicated that the principle of the latter case—prima facie validity of the choice of forum unless unreasonable—would apply to a situation in which the choice of forum selected a state court over a federal court with concurrent diversity jurisdiction. That is to say that the federal diversity jurisdiction statute<sup>353</sup> does not give parties "an absolute right to maintain a suit under the circumstances therein set forth"<sup>354</sup> and is therefore not within the exception providing that a choice of forum will not be enforced which limits a statutory right to litigate in a particular forum. Under the reasonableness test, the court determined that the record failed to show that the choice of forum provision was unreasonable, unjust, unfair, or seriously inconvenient, and so gave effect to the provision and dismissed the suit.<sup>355</sup>

In *Air Economy Corp. v. Aero-Flow Dynamics, Inc.*,<sup>356</sup> a New Jersey court upheld the application of the reasonableness test to a choice of forum clause. The plaintiff had agreed to sell its business to defendant, and the contract of sale included a forum selection provision naming the New York County, New York, courts and choosing to apply New York law. Neither plaintiff nor defendant were New Jersey corporations although the business was located in New Jersey. In a brief per curiam opinion, the court applied the reasonableness test and enforced the choice of forum agreement citing the Restatement (Second) of Conflict of Laws § 80 and *Maryland Casualty*.<sup>357</sup>

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<sup>352</sup> *Id.* at 974.

<sup>353</sup> 28 U.S.C. § 1332(a) (1970).

<sup>354</sup> 364 F. Supp. at 975.

<sup>355</sup> *Id.* at 981. See also *Brown v. Gingiss Int'l., Inc.*, 360 F. Supp. 1042 (E.D. Wis. 1973); text accompanying notes 175-79 *supra*.

<sup>356</sup> 300 A.2d 856 (N.J. Super. 1973).

<sup>357</sup> *Central Contracting Co. v. Maryland Casualty Co.*, 367 F. 2d 341 (3d Cir. 1966).

In another state court decision, *Fidelity & Deposit Co. v. Gainesville Iron Works, Inc.*,<sup>358</sup> a Georgia appellate court applied the traditional common law approach to choice of forum agreements calling the reasonableness test approach of *Maryland Casualty* a "minority viewpoint."<sup>359</sup> However, even though the court refused to apply the modern approach, it is probable that the correct result was reached. In this case, the supplier of labor and materials furnished in construction of a courthouse in Columbus-Muscogee County, Georgia sued the general contractor's surety for payment under the surety bond. The surety agreement had a choice of forum clause limiting actions thereunder to political subdivisions where the project was located. Plaintiff sued in Hall County, Georgia and defendant-surety defended under the choice of forum stipulation.<sup>360</sup> The court held that the state venue law concerning actions against insurers<sup>361</sup> gave claimants several alternative choices, and that a limitation of that alternative by agreement was unenforceable because contrary to public policy.<sup>362</sup> Although the language condemning the modern approach is unfortunate, the opinion is perfectly consistent with it since there is a statutory alternative provided.<sup>363</sup> Furthermore, it also involved the special case of an insurer, thereby conceivably providing good reason not to apply the presumptive validity position. However, the Georgia appellate court in a subsequent decision indicated that it held to the position that contractual forum selection provisions are invalid.<sup>364</sup>

In retrospect, the reasonableness test has been applied by most courts in a predictable and somewhat conventional manner. Absent an inequality of bargaining power resulting in overreaching or an adhesion contract, courts seem to judge reasonableness by a rough analogy to the localizing rules of the

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<sup>358</sup> 189 S.E.2d 130 (Ga. App. 1972).

<sup>359</sup> *Id.* at 131.

<sup>360</sup> *Id.* at 130-31.

<sup>361</sup> GA. CODE § 56-1201 (1972).

<sup>362</sup> 189 S.E.2d at 131.

<sup>363</sup> See text accompanying notes 219-25, *supra*.

<sup>364</sup> *Cartridge Rental Network v. Video Entertainment, Inc.*, 209 S.E. 2d 132 (Ga. App. 1974), "The rationale of that case [*Gainesville Iron Works*] was not solely confined to the statute therein involved but was based on broad considerations of public policy against limiting venue by contract." *Id.* at 133.

Restatement (Second) of Conflict of Laws. Basically, if the chosen forum has significant factual contacts with the transaction, the court will find the choice to be reasonable and enforce the agreement to limit litigation to the chosen forum. For instance, in *Furbee v. Vantage Press, Inc.*,<sup>365</sup> the District of Columbia Court of Appeals upheld a choice of forum provision to be reasonable when the chosen forum had "substantial contacts" with the performance and execution of the contract.<sup>366</sup> In *Furbee* the chosen forum was New York, New York law was chosen by the parties to govern the formation and construction of the contract, it was the parties' residence, it was the place of execution and performance, and the location of the parties and witnesses.<sup>367</sup>

The remaining question is how many factual contacts must there be for a chosen forum to have a significant relationship and render the choice reasonable? *Zapata* indicates that the chosen forum need have no factual contacts with the transaction besides being selected by the parties where the parties are of equal bargaining power. It is probable that the courts will require more factual contacts where the bargaining power of the parties begins to become more unequal, applying a sort of balancing test. The basic concern is that the parties obtain a fair and complete hearing.

The prima facie validity—reasonableness test approach seems to be the clear trend and the preferred position. Its application is required in admiralty cases and implied in other areas controlled by federal law.<sup>368</sup> Moreover, it is being adopted more and more by the state courts. It would be well to proceed somewhat cautiously, however; automatic acceptance and enforcement of choice of forum clauses would be as harmful as the traditional view of near automatic rejection and courts should give due consideration to reasonableness and fairness to prevent abuse. One commentator has noted:

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<sup>365</sup> 464 F.2d 835 (D.C. Cir. 1972).

<sup>366</sup> *Id.* at 837. See text accompanying notes 342-44, *supra*.

<sup>367</sup> *Id.*

<sup>368</sup> See Reese, *supra* note 11, at 537. Professor Reese continues by writing: "The Supreme Court's decision in the *Zapata* case is not of constitutional dimension and hence does not have binding force in areas governed by state law. It should, however, have substantial influence upon the state courts because of the lucidity of its reasoning, the prestige of the court, and the time of its rendition." *Id.*



Even outside the contract of adhesion field, abuse of such clauses is widespread. [citations omitted]. In today's economy, equal bargaining power cannot be "presumed." *Zapata* will render a disservice to sound development of the law if it leads to a choice-of-court-clauses epidemic.<sup>369</sup>

Properly applied, the reasonableness test is flexible enough to allow courts to consider forum selection clauses in the light of basic equitable principles of individualization of justice, good faith, and relief from hardship while at the same time promoting the public policy of expanding freedom of contract and party autonomy. Choice of forum clauses are an important element in promoting more certainty and stability in international and interstate contracts as well as allowing parties to fashion dispute resolution procedures to more nearly fit their needs. These attributes must inevitably encourage an increase in international and interstate contractual arrangements, consequently increasing international trade, and most importantly, international understanding.

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<sup>369</sup> Nadelman, *supra* note 33, at 134. See also Bergman, *Contractual Restrictions on the Forum*, 48 CALIF. L. REV. 438 (1960).